



The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science

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THE SUPREME COURT, HABEAS CORPUS, AND THE WAR ON TERROR: AN ESSAY ON LAW AND POLITICAL SCIENCE

*Richard H. Fallon, Jr.**

This Essay seeks to illuminate the Supreme Court's habeas corpus cases arising from the War on Terror up through the 2008 decision in Boumediene v. Bush by supplementing traditional legal analysis with three propositions derived from recent political science literature. First, the space for judicial review under the Constitution is "politically constructed" by the tolerances of Congress and the President, as supported by public opinion. Consistent with this proposition, the Supreme Court has operated mostly on the margins of the nation's War on Terror policy, but has grown more assertive since the near aftermath of 9/11 in recognition of a changing political climate and a lessening sense of the urgency of the terrorist threat. Second, George W. Bush was a failed "reconstructive President" who came up short in his efforts to persuade the public and the courts to embrace a constitutional vision of vast, unilateral, and judicially unreviewable executive branch authority to combat terrorist threats. Third, the Supreme Court is a "they," not an "it," whose War on Terror rulings have often reflected, as future decisions are likely also to represent, the chance dominance of the view of the median Justice. Because Justice Kennedy has cast the decisive vote in a disproportionate share of cases, the emerging doctrine bears his distinctive stamp.

In matters involving national security, however, the likelihood of final settlement of disputed issues by judicial doctrine is smaller than in less fraught areas of constitutional law. Should the War on Terror become significantly more terrifying, all bets would be off. It is at least inevitable, and may well be desirable, that the ideal of the rule of law should have some (which is not to say limitless) play in the joints—even with respect to the Great Writ of habeas corpus that our tradition celebrates as liberty's ultimate safeguard.

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I also presented an earlier version of this paper at a Columbia Law School Symposium held in May 2009 honoring Henry Monaghan. Henry is one of the giants in the fields of constitutional law and federal courts. Laboring in those fields myself, I have seldom taken up a topic about which Henry had not already written with penetrating insight. Though this Essay is not about Henry, it is written in a genre—of doctrinal scholarship that strives to be more than "merely doctrinal"—of which he is a master. In that sense, I walk in his footsteps once more, with admiration for all he has done to illuminate the way.

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INTRODUCTION

Since the terrorist attacks of September 11, 2001, the use of federal habeas corpus jurisdiction to review executive detentions of alleged enemy combatants has emerged as a topic of high concern to the Supreme Court, to the President, to Congress, to the press and the American public, and of course to constitutional scholars and federal courts teachers. Before 9/11, teaching and scholarship about habeas corpus focused almost exclusively on issues involving collateral review by federal courts of criminal convictions entered by state courts, typically following trials in which defendants were entitled to the full panoply of rights enshrined in the Constitution. For the most part, the function of habeas corpus in furnishing safeguards against executive detentions in the absence of judicial trials was addressed as a matter of historical interest only.¹

The situation now has changed. Between June 2004 and June 2008, the Supreme Court decided six major cases involving the habeas corpus rights of citizens and noncitizens detained by the Executive Branch without judicial trials as terrorist suspects.² As this Essay is written, a seventh

1. See Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 967–87 (1998) (so observing and offering prescient exception of detention accompanying removal of aliens).

2. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008) (holding Military Commissions Act provisions stripping federal courts of habeas jurisdiction over Guantanamo Bay detainees affected unconstitutional suspension of writ of habeas corpus); *Munaf v. Geren*, 128 S. Ct. 2207, 2213 (2008) (holding federal habeas statute grants federal courts jurisdiction over petitions of U.S. citizens held overseas by American forces

case is also pending on the Court's docket.³ On each occasion on which the Court handed down decisions, its rulings drew broad attention. The Court's decisions in *Rasul v. Bush* and *Hamdan v. Rumsfeld* each provoked Congress to enact a statute purporting to withdraw federal habeas corpus jurisdiction to review the lawfulness of the detentions of noncitizens held by the United States as enemy combatants.⁴ When the Supreme Court subsequently invalidated a portion of the second statute in *Boumediene v. Bush*,⁵ those who supported the decision hailed the Court as a bulwark against overreaching legislative and executive power.⁶ By contrast, critics echoed the protests of Justice Scalia's dissenting opinion that the Court had recklessly aggrandized its own authority and that its decision "will almost certainly cause more Americans to be killed."⁷

operating subject to American chain of command but finding petitioner not entitled to relief); *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (invalidating planned scheme of commissions as violative of Uniform Code of Military Justice); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion) (finding authorization for detention of U.S. citizen seized in Afghanistan as enemy combatant but holding due process entitles detainee to meaningful opportunity to challenge detention before impartial decisionmaker); *Rasul v. Bush*, 542 U.S. 466, 481 (2004) (holding federal habeas statute grants federal courts jurisdiction over habeas petitions filed by alien Guantanamo Bay detainees); *Rumsfeld v. Padilla*, 542 U.S. 426, 442–43 (2004) (holding U.S. citizen's habeas petition was improperly filed where detainee failed to name as a respondent commander of naval brig where he was being detained and failed to file challenge in district where naval brig was located).

3. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), cert. granted, 130 S. Ct. 458 (2009) (presenting question whether federal habeas court can, over objections of Executive Branch, order release into continental United States of unlawfully detained noncitizens when it is only possible effective remedy).

4. *Hamdan*, 548 U.S. at 567, 574–76; *Rasul*, 542 U.S. at 481. *Rasul* spurred enactment of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, 42 U.S.C.). Then, when *Hamdan* held that the Detainee Treatment Act had not ousted federal jurisdiction over habeas petitions that were pending at the time of its enactment, 548 U.S. at 574–76, and further held that the government's contemplated scheme for trial of detainees before military commissions contravened applicable law, id. at 567, Congress responded by enacting the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, 42 U.S.C.).

5. 128 S. Ct. at 2240 (holding section 7 of Military Commissions Act of 2006 to be unconstitutional suspension of writ of habeas corpus as applied to Guantanamo prisoners).

6. See, e.g., Ronald Dworkin, *Why It Was a Great Victory*, N.Y. Rev. Books, Aug. 14, 2008, at 18 ("The Supreme Court has now declared that this shameful episode in our history must end."); Editorial, *Unlawful Detention, Instrument of Tyranny*, Seattle Times, June 15, 2008, at B8 ("The ruling goes to the heart of the high court's job description, serving as . . . a referee that whistles a foul when the executive and legislative branches overstep constitutional separations of power."); News Release, Nat'l Ass'n of Criminal Def. Lawyers, *Rule of Law Rules Again at Guantanamo* (June 12, 2008), available at <http://www.nacdl.org/public.nsf/newsreleases/2008mn10?opendocument> (on file with the *Columbia Law Review*) ("As today's decisions emphatically make clear, neither Congress nor the Executive Branch can create 'law-free zones' . . . where the federal courts cannot inquire into the legality of the detention" (internal quotation marks omitted) (quoting Carmen D. Hernandez, President, Nat'l Ass'n of Criminal Def. Lawyers)).

7. *Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting); see also Editorial, President Kennedy, Wall St. J., June 13, 2008, at A14 ("We can say with confident horror that more

Although the sense that the Supreme Court has rendered rulings of great importance is by no means misplaced, a balanced assessment should also attend to what the Court has not done in what have often been described as its War on Terror decisions.⁸ Habeas cases can raise three interconnected but nevertheless distinguishable kinds of issues,⁹ involving (i) judicial jurisdiction to entertain petitions for the writ, (ii) grounds for upholding prisoners' detention or ordering their release, and (iii) the rights of detainees to fair procedures for determining whether they are in fact enemy combatants or otherwise subject to detention without judicial trial.¹⁰ The Supreme Court has taken significant

Americans are likely to die as a result.”). Then-presidential candidate John McCain called *Boumediene* “one of the worst decisions in the history of this country.” Elizabeth Holmes, McCain Condemns Supreme Court Guantanamo Ruling, *WSJ.com Wash. Wire*, June 13, 2008, at http://blogs.wsj.com/washwire/2008/06/13/mccain-condemns-supreme-court-guantanamo-ruling/?mod=homeblogmod_washingtonwire (on file with the *Columbia Law Review*).

8. The term “war” is not a perfect fit for the United States’s confrontation with forces of global terrorism. The enemy is not a nation-state. In addition, many acts of terrorist violence are ordinary crimes, the shadowy perpetrators of which may be only loosely affiliated with one another, if they are affiliated at all. Partly as a result, the Obama Administration appears to be less vehement than the Bush Administration in its ascription of the “War on Terror” label. See Toby Harnden, Obama “Is Not Leading a Global War on Terror,” *Daily Tel. (London)*, Aug. 8, 2009, at 15 (describing Obama Administration’s move away from “Global War on Terror” framework); Howard LaFranchi & Gordon Lubold, Obama Redefines War on Terror, *Christian Sci. Monitor*, Jan. 30, 2009, at 25 (“Now, [RAND Corporation terrorism expert Brian Michael] Jenkins says, we are more likely to hear references to ‘battling’ or ‘combating’ terrorism—words that take the ideological edge out of the fight, putting it more on par with combating crime.”). In the Court’s cases to date, however, it has at least not rejected the War on Terror characterization—indeed, the plurality opinion employed it in *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004)—which may be relevant to both the political and the legal framework within which the Court functions. At stake, for example, may be answers to questions about whether and when the laws of war apply. See, e.g., *id.* at 518 (resolving question about President’s authority to detain citizens apprehended while fighting on Afghan battlefields by reasoning that “detention of individuals falling into the limited category we are considering . . . is so fundamental and accepted an incident of war as to be an exercise of the ‘necessary and appropriate force’ Congress authorized the President to use”).

9. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 *Harv. L. Rev.* 2029, 2034 (2007) (discussing key analytical distinctions bearing on discussion of executive detention cases).

10. The Bush Administration claimed inherent executive authority to detain all those who “supported hostilities in aid of enemy forces,” a group to which it applied the label of “enemy combatants.” Respondents’ Statement of Legal Justification for Detention at 1–2, *In re Guantanamo Bay Detainee Litig.*, No. 08-442 (D.D.C. Dec. 4, 2008). The Obama Administration appears to have disavowed the enemy combatant label. See Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantanamo Bay*, No. 08-442 (D.D.C. Mar. 13, 2009) [hereinafter, Memorandum Regarding the Government’s Detention Authority] (avoiding use of enemy combatant term). Nevertheless, it continues to assert authority to detain anyone who “substantially supported . . . Taliban or al-Qaida or associated forces that are engaged in hostilities.” *Id.*; see also Peter Baker, Obama to Use Current Law to Support Detentions, *N.Y. Times*, Sept. 24, 2009, at A23 (discussing Obama Administration’s

steps in each area, but it has also moved cautiously and left many important questions unanswered.

The Court has taken a relatively assertive position in defining the reach of federal habeas jurisdiction and thereby increased the number of cases to which the federal judiciary's law-declaring authority extends. First in *Rasul v. Bush* and later in *Boumediene v. Bush*, narrow Court majorities laboriously distinguished a World War II-era precedent that had ruled that federal habeas jurisdiction did not extend to German prisoners of war in occupied Germany¹¹ in order to hold that the writ must be available to noncitizens detained by the Executive at Guantánamo Bay, Cuba.¹² In *Rasul*, the Court determined that federal jurisdiction over Guantanamo detainees existed under the general habeas statute.¹³ When Congress then attempted to withdraw the statutory jurisdiction that *Rasul* had upheld by passing the Detainee Treatment Act of 2005,¹⁴ followed by the Military Commissions Act of 2006,¹⁵ a five-member majority ruled in *Boumediene* that Congress's jurisdiction-stripping effort violated the Suspension Clause of Article I, Section 9, Clause 2, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."¹⁶ In addition to holding expressly that the federal courts have habeas corpus jurisdiction over detainees at Guantanamo, *Rasul* intimated that the federal courts' authority to issue the writ on behalf of noncitizen detainees might extend around the world to Iraq and Afghanistan, among other places.¹⁷ Although not explicit on the point, *Boumediene* also leaves that possibility open.¹⁸

decision to forgo congressional authorization for indefinite detention of Guantanamo detainees, relying instead on implied authority under Authorization for Use of Military Force).

11. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

12. See *Boumediene*, 128 S. Ct. at 2257–61 (arguing *Eisentrager* adopted, or was at least “not inconsistent with a functional approach to questions of extraterritoriality,” and that the situation in *Eisentrager* was different because petitioners there did not contest that they were enemy combatants, U.S. control over site of detention “was neither absolute nor indefinite,” and *Eisentrager* involved greater likelihood that judicial interference would pose security risks); *Rasul v. Bush*, 542 U.S. 466, 475–79 (2004) (distinguishing *Eisentrager* on grounds that petitioners there were “differently situated,” that critical factors underlying its holding “were relevant only” to a constitutional, not statutory holding, and that subsequent Court decisions “have filled the statutory gap that had occasioned *Eisentrager*’s resort to ‘fundamentals’”).

13. 542 U.S. at 481 (applying 28 U.S.C. § 2241(c)(1) (2006)).

14. Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2680, 2741–42 (codified as amended at 28 U.S.C. § 2241(e)(1)), invalidated as applied by *Boumediene*, 128 S. Ct. 2229.

15. Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified at 28 U.S.C. § 2241(e)(1)), invalidated as applied by *Boumediene*, 128 S. Ct. 2229.

16. See 128 S. Ct. at 2240 (applying U.S. Const. art. I, § 9, cl. 2).

17. For a discussion on *Rasul*’s indications pro and con on this point, see Fallon & Meltzer, *supra* note 9, at 2059 & n.116.

18. See *infra* notes 130–132 and accompanying text.

With respect to substantive rights, the Court has rendered two decisions, both adverse to the detainees who petitioned for the writ. In 2004, *Hamdi v. Rumsfeld* held—albeit without a majority opinion—that the government could indefinitely hold as an enemy combatant, without right to trial by jury, an American citizen who had been seized on a battlefield in Afghanistan and then transported by the military to the United States.¹⁹ Four years later, the Court ruled unanimously in *Munaf v. Geren* that a U.S. citizen detained by the U.S. military in Iraq had no substantive right enforceable on habeas not to be transferred to Iraqi authorities for criminal prosecution.²⁰

Significantly, however, the Court has failed to resolve large questions. In *Rumsfeld v. Padilla*, the Court, by a five-to-four margin, seized on a disputable technicality to avoid determining whether the *Hamdi* rationale, which permits the indefinite detention of an American citizen seized as an enemy combatant on a foreign battlefield,²¹ would apply to a citizen that the government apprehended within the United States.²² According to the Court's majority, Padilla's lawyers had presented their habeas petition to the wrong court, and any determination of the central issue in the case would need to await a proper filing.²³ The Court has also left unresolved a number of questions about the legality of executive detention of noncitizens that the government has seized as terrorists or terrorist supporters within the United States.²⁴

Perhaps the most important unresolved question—for citizens and noncitizens alike—involves the legally permissible breadth of the category of suspected “enemy combatants” or terrorist suspects that the Executive Branch can detain,²⁵ perhaps indefinitely, without trial for any crime. In *Hamdi*, the Court found legal authorization for the detention at least of persons who were “‘part of or supporting forces hostile to the

19. See 542 U.S. 507, 519 (2004) (plurality opinion) (concluding Authorization for Use of Military Force sanctioned executive detention of enemy combatants); *id.* at 588 (Thomas, J., dissenting) (same).

20. 128 S. Ct. 2207, 2220 (2008).

21. See *Hamdi*, 542 U.S. at 519 (plurality opinion) (authorizing detention of petitioners “for the duration of these hostilities”).

22. See *Rumsfeld v. Padilla*, 542 U.S. 426, 442 (2004) (dismissing as improperly filed U.S. citizen's habeas challenge to detention as enemy combatant).

23. See *id.* at 451 (holding proper forum for filing habeas petition by U.S. citizen detained in naval brig was district court in which naval brig was located). Padilla's lawyer had filed the habeas petition in New York, where he was initially detained, even though the military had removed Padilla to South Carolina two days earlier. *Id.* at 431–32.

24. The Supreme Court granted certiorari in a case presenting some of those questions, *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), cert. granted, 129 S. Ct. 680 (2008), but the Government subsequently mooted the dispute about the permissibility of al-Marri's noncriminal detention by filing criminal charges against him in an Article III federal court. See *al-Marri v. Spagone*, 129 S. Ct. 1545, 1545 (2009) (dismissing appeal as moot); Indictment, *United States v. al-Marri*, No. 09-CR-10030 (C.D. Ill. Feb. 26, 2009) (charging al-Marri with providing material support and resources to foreign terrorist organization and for conspiring to do so).

25. See *supra* note 10 and accompanying text.

United States or coalition partners' in Afghanistan and who 'engaged in armed conflict against the United States' there."²⁶ Subsequently, the Bush Administration defined the enemy combatant category much more capaciously, to encompass anyone "who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."²⁷ As a government lawyer once acknowledged, this definition would cover "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities."²⁸ More recently, the Obama Administration has disavowed the label "enemy combatant" as lacking legal significance and has claimed authority to detain without trial only an apparently narrower, but still highly significant, class of persons who "substantially support[] . . . Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners."²⁹ The Supreme Court has not yet said whether any broader definition of the class of permissible detainees than the one that it used in *Hamdi* would be legally and constitutionally acceptable and, if so, where it will draw the line.

In the domain of procedure and rights to judicial review, *Hamdi* applied the balancing test of *Mathews v. Eldridge*³⁰ to determine the procedural safeguards due to a citizen seized outside the United States who sought to challenge the Executive Branch's designation of him as an enemy combatant subject to indefinite detention.³¹ *Hamdi* strongly signaled that adjudication by a military commission would suffice,³² but left many details to be worked out. In *Boumediene*, the Court then held that noncitizen detainees may use the writ of habeas corpus to assert challenges to their detentions by the Executive Branch, notwithstanding the

26. 542 U.S. at 516 (plurality opinion) (internal quotation marks omitted) (quoting Brief for Respondents at 3, *Hamdi*, 542 U.S. 507 (No. 03-6696)).

27. See Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (on file with the *Columbia Law Review*) (regarding "Order Establishing Combatant Status Review Tribunal"); see also Brief for the Respondents at 62-63, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196) (regarding scope of executive detention authority under Authorization to Use Military Force); Respondents' Memorandum Addressing the Definition of Enemy Combatant at 4, *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008) (No. 04-1166) (same).

28. Brief for the *Boumediene* Petitioners at 34, *Boumediene*, 128 S. Ct. 2229 (No. 06-1195) (internal quotation marks omitted) (quoting *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005)).

29. Memorandum Regarding the Government's Detention Authority, *supra* note 10, at 2.

30. 424 U.S. 319, 335 (1976).

31. See *Hamdi*, 542 U.S. at 529-35 (plurality opinion) (applying *Mathews v. Eldridge* factors).

32. See *id.* at 538 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances . . .").

government's provision of alternative administrative and judicial review mechanisms.³³ But it postponed deciding exactly what procedural rights a military tribunal must afford to noncitizen detainees in determining whether they are enemy combatants or otherwise subject to continued detention.³⁴ Among the unanswered questions is the standard of proof that the government must satisfy.³⁵

With the Supreme Court having rendered so many important habeas corpus decisions in the ongoing battle against global terrorism, yet having left so many issues still unresolved, my aim in this Essay is to survey and assess the Court's performance to date. Much of my analysis will be distinctively legal: It will seek to array decisions in patterns, to identify the doctrine that has emerged, and to appraise the Court's rulings on some issues and avoidance of others in light of Legal Process assumptions about the comparative competences of different governmental institutions and about the functions that courts can, and cannot, perform well.³⁶

Among this Essay's largest ambitions, however, will be to put the Court's decisions into a broader perspective by examining them through

33. See 128 S. Ct. at 2269–74 (holding Combatant Status Review Tribunals did not provide constitutionally acceptable substitute for habeas review in federal court).

34. See *id.* at 2277 (“It bears repeating that our opinion does not address the content of the law that governs petitioners’ detention.”). For a discussion of appropriate burdens of proof and an argument for a variable standard that takes reasonably feared dangerousness into account, see Matthew C. Waxman, *Detention As Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 *Colum. L. Rev.* 1365 (2008).

35. In district court litigation, both Judge Leon (who is hearing the *Boumediene* petitions) and Judge Hogan (who is presiding over most other petitions in a case coordination effort) have issued case management orders outlining the applicable procedural rules and evidentiary standards. See *In re Guantanamo Bay Detainee Litig.*, No. 08-442, 2008 WL 5245890 (D.D.C. Dec. 16, 2008); Case Management Order, *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008) (No. 04-1166), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1166-142. These case management orders have been repeatedly revisited and amended on a case-by-case basis in light of unfolding developments. See, e.g., *Al Halmandy v. Obama*, 612 F. Supp. 2d 45 (D.D.C. 2009) (amending case management order to incorporate additional procedures in case of single Guantanamo detainee). As this Essay went to press, the D.C. Circuit had recently upheld the procedures outlined in the case management orders against a constitutional challenge brought by a noncitizen seized in a foreign country and detained at Guantanamo. *Al-Bihani v. Obama*, No. 09-5051, 2010 U.S. App. LEXIS 102, at *22–*40 (D.C. Cir. Jan. 5, 2010). In particular, the D.C. Circuit held that the district court could employ a preponderance of the evidence standard of proof in adjudicating the detainee’s habeas claim, that the burden of proof could be shifted to the petitioner, and that hearsay evidence was admissible so long as a district court could assess its probative weight. *Id.* at *29–*39.

36. For an illuminating general discussion of the Legal Process school, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, at li (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). For an argument that courts should adopt a Legal Process approach to issues involving federal habeas corpus, see Fallon & Meltzer, *supra* note 9, at 2041–45.

a lens that recent work by political scientists provides. In light of political scientists' impressive success in predicting Supreme Court decisions, legal scholars have, appropriately, begun to examine how positive and normative theories of judicial behavior relate to one another.³⁷ Although I have no precise answer to the general question of how positive political theory relates to normative legal theory, the Supreme Court's decisions arising from the War on Terror afford rich test cases for examining the capacity of political science to illuminate how constitutional law develops, even on the assumption that judges and Justices feel and respond to a sense of legal obligation.³⁸ Three propositions either directly supplied by or derived from recent political science literature seem especially helpful in understanding what the Court has done and not done:

* *First*, the space for judicial review under the Constitution is "politically constructed" by the wishes and tolerances of Congress and the President, as supported by public opinion.³⁹

* *Second*, George W. Bush was a failed "reconstructive President" who came up short in his efforts to persuade the public and the courts to embrace a constitutional vision of vast, unilateral, judicially unreviewable executive branch authority to combat terrorist threats.⁴⁰

* *Third*, the Supreme Court is a "they," not an "it," whose past War on Terror rulings have often reflected, as future decisions are likely also to represent, the chance dominance of the views of the median Justice.⁴¹

If one were pressed to choose between a legal doctrinalist and a political scientific perspective on the Supreme Court's War on Terror habeas cases, each would have much to commend it. This, presumably, is why law professors and political scientists typically write about constitutional adjudication so differently. Law professors generally focus on the meanings of legal texts and judicial opinions and analyze the weight of the legal reasons supporting judicial outcomes. By contrast, political scientists commonly assume that some or all judicial motivations arise from policy values or other preferences extrinsic to law. They seek to explain and predict how judges will decide cases in light of their prefer-

37. See, e.g., Barry Friedman, *The Politics of Judicial Review*, 84 *Tex. L. Rev.* 257, 261 (2005) ("Normative theory about judicial review limits its own possibilities and worth by failing to come to grips with what positive scholarship teaches about the political environment in which constitutional judges act and about the constraints they necessarily face."); Adrian Vermeule, *Connecting Positive and Normative Legal Theory*, 10 *U. Pa. J. Const. L.* 387 (2008) (discussing disconnect between positive and normative theories of constitutional interpretation and suggesting strategies for bridging the methodologies).

38. For a defense of this assumption, and an attempt to show its compatibility with the premise that judges and Justices also feel and respond to threats of sanctions and other "external constraints," see Richard H. Fallon, Jr., *Constitutional Constraints*, 97 *Cal. L. Rev.* 975, 1015–24 (2009) [hereinafter Fallon, *Constitutional Constraints*].

39. See *infra* Part I.A.

40. See *infra* Part I.B.

41. See *infra* Part I.C.

ences, on the one hand, and their need to respond strategically to a variety of constraints, on the other hand.⁴²

Insofar as legal and political science scholars diverge in their foci of concern, their modes of analysis can each accurately describe the same phenomena from different vantage points. In this Essay, however, my aim will not be to choose between legalist and political scientific perspectives, nor even just to move back and forth between them, but to show how the insights of political science can inform more characteristically legal analysis.

The remainder of this Essay unfolds as follows. Part I explicates the three political scientific claims that I recited above and demonstrates their general capacity to illuminate decisionmaking by the Supreme Court. Part II focuses on habeas corpus and Suspension Clause issues. It charts what the Court has done so far and shows how premises derived from political science can explain the Justices' pattern of decisions. More tentatively, Part II also discusses how judicial thinking that appears merely "strategic" from a political scientific perspective might be assimilated into a normative or legal framework, and speculates about likely future developments. By way of conclusion, Part III reflects on the significance, and more pointedly on the limits, of habeas corpus doctrine that predictably rises to prominence almost exclusively in times of war and perceived emergency, when the stakes of particular cases seem peculiarly likely to unsettle prior judgments.

As James Madison remarked long ago, much of the Constitution emerged from the 1787 Convention and the subsequent ratification debates with uncertain implications.⁴³ Accordingly, Madison foresaw, much of the Constitution's meaning would need to be "liquidated" through practice and precedent.⁴⁴ Through constitutional history, numerous issues involving the ultimate reach of the President's power to respond to national security threats have occupied the zone of uncertain constitutional meaning. Some such issues have arisen, and continue to arise, within the habeas corpus jurisdiction of the federal courts.⁴⁵ In this area of the law, however, definitive liquidation has proven elusive. When fundamental liberty interests clash with the felt imperatives of national secur-

42. See, e.g., Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 *Emory L.J.* 583, 592 (2001) (proposing "strategic approach" that "starts" with attitudinalist premise that Justices are "single-minded seekers of legal policy" but assumes they must behave strategically to effectively advance policy goals).

43. *The Federalist* No. 37 (James Madison), at 228–29 (Clinton Rossiter ed., 1961); see also Henry Paul Monaghan, *Doing Originalism*, 104 *Colum. L. Rev.* 32, 38 n.37 (2004) ("Neither Madison nor anyone else believed that the document set out, once and for all, a clear set of rules.").

44. *The Federalist* No. 37, *supra* note 43, at 228–29 (James Madison).

45. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2248, 2251 (2008) (acknowledging historical materials provide no clear answer as to whether habeas jurisdiction protected by Suspension Clause extends to Guantanamo Bay).

ity, the stakes invariably are, or are perceived as being, very high. With so much apparently at risk, courts tend not to adhere to previously announced rules of decision when those rules' practical implications appear improvident to them.⁴⁶

We might think of the resulting state of affairs—in which individual rights are both ill-defined in many respects and vulnerable to revision even when they look well-defined—as illustrating the failure of the American constitutional order to adhere to a rule of law ideal of decision in accord with clear rules fixed in advance and applied unvaryingly.⁴⁷ Alternatively, we might judge that the ideal of the rule of law should have some measure of flexibility even in cases within the scope of the Great Writ of habeas corpus.⁴⁸ My own thinking inclines toward the latter view.

I. THREE THEMES FROM POLITICAL SCIENCE

Political science embraces many diverse perspectives and modes of analysis. Accordingly, I make no claim to summarize a single, distinctively and essentially political scientific perspective on law or constitutional adjudication. But the three themes I highlighted in the introduction—that the space for judicial review is “politically constructed,” that George W. Bush was a failed “reconstructive President,” and that the Supreme Court

46. Leading examples include the Supreme Court's strained distinction of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119 (1866), in *Ex parte Quirin*, 317 U.S. 1, 45–46 (1942), see *infra* notes 152–158 and accompanying text, and its retreat in *Boumediene* from *Hamdi*'s suggestion that decisions by properly constituted military tribunals would satisfy the requirements of due process for prisoners subject to detention as enemy combatants, see *infra* notes 187–192 and accompanying text. For a discussion of *Quirin*'s questionable distinction of *Milligan*, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 570–72 (2004) (Scalia, J., dissenting) (“In my view, [*Quirin*'s interpretation of *Milligan*] seeks to revise *Milligan* rather than describe it.”). For a discussion of *Boumediene*'s apparent deviation from the Court's prior position in *Hamdi*, see *Boumediene*, 128 S. Ct. at 2284–85 (Roberts, C.J., dissenting) (“[T]he *Hamdi* plurality concluded that this type of review would be enough to satisfy due process, even for citizens. Congress followed the Court's lead, only to find itself the victim of a constitutional bait and switch.” (citations omitted)); Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 Sup. Ct. Rev. 1, 40–47 (discussing tension between *Hamdi*'s discussion of appropriate procedures to determine enemy combatant status and *Boumediene*'s holding that Combatant Status Review Tribunals were inadequate); see also Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 *Notre Dame L. Rev.* 1975, 2050 (2009) (predicting that “when the next military crisis rears its ugly head, the Court will uphold whatever policies the President deems prudent” and will do so “by relying upon the precedent that” recent decisions “took such pains to distinguish rather than overrule”).

47. See Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 *Colum. L. Rev.* 1, 14 (1997) (describing a formalist ideal type of the rule of law that demands decisions in accordance with clear rules set out in advance).

48. See *id.* at 54–55 (describing rule of law ideal as one that would explain how to weigh competing desiderata, and discussing flexibility and contestability of constitutional ideal of rule of law); cf. William H. Rehnquist, *All the Laws But One* 224–25 (Vintage Books 2000) (1998) (“It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime.”).

is a “they,” not an “it”—all are either prominent in or suggested by recent work in political science. These themes also illuminate the habeas corpus cases that the Supreme Court has decided in connection with the War on Terror.

A. *The Politically Constructed Space for Judicial Review*

Critics sometimes complain that we have government by judiciary⁴⁹ or that the Constitution means whatever the Supreme Court says it means.⁵⁰ It is much more accurate to say, as many political scientists do, that the domain within which the Court possesses recognized and effective authority is politically constructed.⁵¹

Political scientists sometimes refer to the view that other officials must treat judicial pronouncements as legally binding as the doctrine of judicial supremacy.⁵² The best explanation of how courts could have acquired and maintained this trumping power is that, with respect to the kinds of issues on which the courts speak authoritatively, elected officials generally prefer that courts should have the last word, provided that judicial decisions remain within the bounds of political and practical tolerability.⁵³ Maintaining an independent judiciary within a limited domain may be the preferred strategy of risk-averse political leaders, who willingly forgo some opportunities to exercise authority while they hold office in order to prevent unbounded power by their political adversaries when

49. See, e.g., Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 18 (1977) (“[T]he Supreme Court is not empowered to rewrite the Constitution . . . [but] it has demonstrably done so. Thereby the Justices, who are virtually unaccountable, irremovable, and irreversible, have taken over from the people control of their own destiny, an awesome exercise of power.”). See generally Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 Harv. L. Rev. 4, 5–8 (2006) (outlining history and structure of debate over “government by judiciary”).

50. The most celebrated source for this claim is Charles Evans Hughes, who would later serve as Chief Justice of the United States. See Charles Evans Hughes, *Addresses of Charles Evans Hughes, 1906–1916*, at 185 (2d ed. 1916) (“We are under a Constitution, but the Constitution is what the judges say it is . . .”).

51. See, e.g., Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* 4 (2007) (explaining thesis that “judicial supremacy” is “politically constructed”); Mark A. Graber, *Constructing Judicial Review*, 8 Ann. Rev. Pol. Sci. 425, 425 (2005) (reviewing emerging body of political science literature that frames judicial review as institution constructed by the political branches).

52. See Whittington, *supra* note 51, at 3–4 (characterizing doctrine that other branches must accept judicial interpretations of Constitution as “judicial supremacy”).

53. See *id.* at 25 (“As it has become evident that judicial supremacy is more often a help than a hindrance to political leaders, judicial supremacy has become more prominent and secure.”). See generally Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004) (describing conditions under which vulnerable political elites in other nations have chosen to establish robust schemes of judicial review to protect then-prevailing elite’s values).

the adversaries triumph at the polls.⁵⁴ Politicians may also find it to their electoral advantage to leave a range of contentious issues for judicial decision.⁵⁵

In the United States today, the Supreme Court can authoritatively resolve constitutional issues within an impressively broad policy space. For example, almost no one questions the Court's mandate to determine the constitutionality of affirmative action programs, gun control legislation, or restrictions on political campaign contributions, however much critics may dislike the conclusions the Court reaches. But the Court would almost as clearly step outside its bounds if it identified constitutional questions entitling it to the last word on what, if any, stimulus policies the government should employ in the face of a sagging economy, what marginal tax rates ought to be, or whether the United States must maintain forces in or withdraw its troops from Iraq or Afghanistan. To take other examples that once were more live, the Court would stray outside the politically acceptable space for judicial review if it were to hold, today, that Social Security or paper money is unconstitutional.⁵⁶ In the practically unimaginable event that the Court were to upset settled social and political expectations in such an egregiously disruptive way, its decisions almost surely would not stick. The only question would involve the precise mechanism by which the Court's intolerable rulings would be denied effect—whether, for example, by executive and congressional defiance, a statutory denial of jurisdiction to any court to enforce the intoler-

54. See Matthew C. Stephenson, "When the Devil Turns . . .": The Political Foundations of Independent Judicial Review, 32 *J. Legal Stud.* 59, 59 (2003) (providing formal model and empirical test for hypothesis that risk-averse political actors accept judicial review to enforce mutual restraint in ongoing political competition).

55. See, e.g., Whittington, *supra* note 51, at 134–52 (describing how judicial supremacy in constitutional interpretation serves elected officials' interests in winning reelection by permitting them to engage in political posturing and blame avoidance); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *Stud. Am. Pol. Dev.* 35, 38 (1993) ("When disputes arise that most elected officials would rather not address publicly, Supreme Court justices may serve the interests of the political status quo by . . . making policy favored by political elites."); Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 *Am. Pol. Sci. Rev.* 321, 328 (2007) (noting that Court's decisions invalidating federal statutes on federalism grounds "allow Republican legislators to posture for their constituents by enacting popular civil rights statutes . . . while pursuing their broader ideological agenda of limited government through the courts"). Congress and the President may also be happy to see dominant national visions enforced against the states, Whittington, *supra* note 51, at 105–07, and to delegate to the courts a number of issues possessing low political salience, see *id.* at 121 ("An informal division of labor can easily develop in which elected officials are seen to render decisions that will win political plaudits while judges toil over decisions that are deemed unworthy of legislative attention.").

56. See Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 *N.C. L. Rev.* 1107, 1141–42, 1150 (2008) [hereinafter Fallon, *Constitutional Precedent*] (arguing public attitudes constrain the Supreme Court's decisionmaking with regard to widely accepted institutions and practices).

erable decisions, impeachments of Justices who joined the majority opinion, Court-packing, or some combination of these or similar responses.

That the Supreme Court's exercise of judicial review occurs within politically constructed bounds is easy to overlook in ordinary times, but can take on salience in war and emergency. In past wars and emergencies, Presidents have either defied or credibly threatened to defy judicial rulings that they thought would endanger vital national interests—under circumstances in which Presidents could have anticipated that aroused public opinion would have sided with them and against the Court.⁵⁷ These presidential acts and threats of defiance were of course anomalous. But equally anomalous are judicial rulings that intrude into the heart of what are broadly understood to be the political branches' domains of discretionary authority, especially with respect to war and national security.

In claiming that judicial review functions within a politically constructed domain, I think it important to distinguish, as political scientists have not always done, between what I shall characterize as harder and softer versions of the political construction thesis. The harder version holds that political officials, with the public's approbation, would dismiss some otherwise imaginable Supreme Court rulings as *ultra vires* and refuse to treat them as authoritative. The softer version maintains that Court decisions or patterns of Court decisions that provoke sufficiently broad and enduring public outrage will not survive in the long run even if they do not provoke immediate defiance. Over time, the voters will elect Presidents who oppose the politically intolerable decisions. Those

57. During the Civil War, President Lincoln famously defied Chief Justice Taney's order to release a prisoner in *Ex parte Merryman*, 17 F. Cas. 144, 152–53 (Taney, Circuit Justice, C.C.D. Md. 1861) (No. 9,487). For an account of the surrounding events and an analysis of the decision, see Daniel A. Farber, *Lincoln's Constitution* 17, 157–63, 188–95 (2003). During World War II, President Roosevelt may have influenced the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), by letting it be known to the Justices, in advance, that he would defy the Court's decision if it ruled that the United States could not try the petitioners, who were would-be German saboteurs, before a military commission rather than an Article III court. See Pierce O'Donnell, *In Time of War* 213 (2005) (detailing private communications between Roosevelt Administration and Justices leading up to decision); David J. Danielski, *The Saboteur's Case*, 1996 J. Sup. Ct. Hist. 61, 69 (discussing fears among Justices during preliminary discussion that Roosevelt would execute petitioners despite Court action). Roosevelt had apparently also prepared a message explaining his reasons for defying what he feared would be a Supreme Court ruling invalidating emergency legislation, enacted in the crisis of the Great Depression, nullifying clauses in public and private contracts that required payment in gold. See Whittington, *supra* note 51, at 37–38 (describing draft of President's speech). The address became unnecessary when the Supreme Court's rulings upheld the government's position in the most important respects. See *Perry v. United States*, 294 U.S. 330, 357–58 (1935) (ruling that although United States had breached its contract obligations under public contracts requiring payment in gold, plaintiff bondholder had suffered no actual damage and could not sue in Court of Claims); *Nortz v. United States*, 294 U.S. 317, 329 (1935) (finding that holder of "gold certificate" issued by federal government who was instead paid in cash had suffered no compensable loss); *Norman v. Balt. & Ohio R.R.*, 294 U.S. 240, 311 (1935) (upholding congressional power to regulate monetary system).

Presidents then will nominate, and the Senate will confirm, Justices who will undermine or overrule those decisions.

At the time of any particular judicial decision, the strength and durability of the kind of anticipated public outrage that matters to the softer version of the political construction thesis may be difficult, perhaps impossible, to quantify accurately. Backlash may dissipate.⁵⁸ Public attitudes can be fickle, public attention fleeting. In addition, the Court possesses enough institutional capital so that it can render some decisions that are broadly unpopular, at least in the first instance, without undermining its generally good reputation.⁵⁹ But relative acceptability of Court decisions in the short-term does not guarantee acceptability in the long-term. Among the insights embedded in the political construction thesis is that the politically acceptable bounds of judicial authority can fluctuate. To take a topical example, if a judicial decision were to be perceived in the future as having disabled the Executive Branch from forestalling a major terrorist attack, the bounds of politically tolerated judicial authority could easily shrink, with both political officials and the public becoming more prone to regard judicial rulings that expand the rights of terrorist suspects as *ultra vires*.

A further point also bears emphasis. Behind both versions of the thesis that judicial review occurs within a politically constructed space lies an assumption that judges and Justices are aware of and decide cases in light of the political limits on their authority.⁶⁰ This assumption, in turn,

58. See generally Michael Klarman, *Brown and Lawrence* (and *Goodridge*), 104 Mich. L. Rev. 431, 452–82 (2005) (discussing backlash against judicial opinions).

59. See, e.g., James L. Gibson, The Legitimacy of the U.S. Supreme Court in a Polarized Polity, 5 J. Empirical Legal Stud. 507, 533 (2007) (“Although the American people are severely divided on many important issues of public policy, when it comes to the institution itself, support for the Court has little if anything to do with ideology and partisanship.”); James L. Gibson et al., Measuring Attitudes Toward the United States Supreme Court, 47 Am. J. Pol. Sci. 354, 358, 361 (2003) (concluding that “[j]udgments of specific policies are entirely unrelated to confidence in the Court” and that “over four of five Americans assert that it would not be better to do away with the Court, even if there were fairly widespread displeasure with its decisions” (emphasis omitted)); Tom R. Tyler & Gregory Mitchell, Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights, 43 Duke L.J. 703, 781 (1994) (reporting findings that views of “institutional legitimacy” were “generally unrelated to support for Court decisions” with respect to abortion). But see James W. Stoutenborough & Donald P. Haider-Markel, Public Confidence in the U.S. Supreme Court: A New Look at the Impact of Court Decisions, 45 Soc. Sci. J. 28, 41 (2008) (finding “evidence that decisions issued by the Court can influence confidence in the Court and this influence is . . . [important] for predicting confidence”).

60. The political science literature both reflects and provides some support for the assumption that judges are aware of and respond to public opinion. See William Mishler & Reginald S. Sheehan, The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions, 87 Am. Pol. Sci. Rev. 87, 96 (1993) (finding evidence of “the existence of a responsive Court whose decisions not only reflect changes in public opinion but also serve to reinforce and legitimize opinion change in an iterative process”); James A. Stimson et al., Dynamic Representation, 89 Am. Pol. Sci. Rev. 543, 555 (1995) (arguing that Justices consider whether to “choose their ‘ideal point’ and

rests on yet a deeper assumption that members of the Supreme Court, consciously or unconsciously, endeavor to preserve the public's trust and respect, on which the Court's authority to decide cases conclusively in the short run, and the capacity of its rulings to survive over time, both depend.⁶¹ Although this deeper assumption is extraordinarily important, it is also irreducibly vague, for there is no good reason to believe that all Justices will appraise the significance of the public's likely responses to their decisions in precisely the same way. I shall return to this theme below, when I discuss the political scientists' reminder that the Supreme Court is a "they," not an "it."⁶²

If we look at the Supreme Court's War on Terror cases through the lens of the political scientific claim that the domain of judicial review is politically constructed, two preliminary points stand out. First, the Court has operated almost wholly at the margins of the United States's War on Terror policy,⁶³ with its interventions limited to cases arising from physical detentions of terrorist suspects in the absence of judicial trial.⁶⁴ Al-

engage political opposition" or "compromise in an effort to avoid . . . political opposition," and that "institutionally minded justices . . . compromise in order to save the institution"); see also Richard A. Posner, *How Judges Think* 375 (2008) [hereinafter Posner, *How Judges Think*] (asserting that Justices decide cases in light of "an awareness, conscious or unconscious, that they cannot go 'too far' without inviting reprisals by the other branches of government spurred on by an indignant public"); Frank B. Cross, *What Do Judges Want?*, 87 *Tex. L. Rev.* 183, 192–93 (2008) (reviewing Posner, *How Judges Think*, *supra*) (summarizing political science studies showing that "simple 'public opinion' is . . . an important constraint on [Supreme Court] decisions").

61. For a defense of this further assumption, see Fallon, *Constitutional Precedent*, *supra* note 56, at 1140–42 (discussing Supreme Court's historical tendency to employ rules of recognition and decision likely to be accepted as legitimate by public opinion and the political branches). Admittedly, the assumption is controversial. The one opinion of which I know in which the Court said that a concern for its "legitimacy" in the eyes of the public was a factor bearing on its decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 867–69 (1992), provoked vehement protests both by dissenting Justices and by commentators. See *id.* at 996–1001 (Scalia, J., concurring in the judgment in part and dissenting in part) ("I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—*against* overruling, no less—by the substantial and continuing public opposition the decision has generated."); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 *Notre Dame L. Rev.* 995, 1031–38 (2003) ("The Court in *Casey* . . . says the most monstrous thing imaginable: that the Court should adhere to even clearly wrong decisions, and especially to its most egregiously wrong decisions, so that it can avoid damage to its own legitimacy and maintain its power.").

62. See *infra* Part I.C.

63. Cf. Robert G. McCloskey, *The American Supreme Court* 250 (4th rev. ed. 2005) ("The Court's greatest successes have been achieved when it has operated near the margins rather than in the center of political controversy . . .").

64. See generally Stephen I. Vladeck, *The Long War, The Federal Courts, and the Necessity/Legality Paradox*, 43 *U. Rich. L. Rev.* 893, 897 (2009) (book review) (arguing Supreme Court, in exercise of its certiorari jurisdiction, "has been *too* passive, missing opportunities to identify limits on the government's authority in a number of cases of equal—or even greater—significance than the Guantánamo litigation"). The Court's one non-habeas case arising from the War on Terror to date, *Ashcroft v. Iqbal*, 129 S. Ct. 1937

though much of the policy debate surrounding the invasion of Iraq and military operations in Iraq and Afghanistan has involved questions of international law,⁶⁵ the Court never has asserted, and it seems most unlikely ever to assert, jurisdiction to halt the movement of armies or the dropping of bombs on the basis that the Constitution's authors and ratifiers presupposed international law limits on the government's war powers—even though it is plausible to believe that they did.⁶⁶ Almost no one argues seriously that courts might halt or redress the deprivations of liberty and property that result from American bombing and other military actions outside the United States.⁶⁷ To put the point more vividly, the government could have shot, bombed, or killed any or all of the Guantanamo detainees whose cases have appeared to present the most urgent justiciable issues arising from the War on Terror without confronting any judicially enforceable restraints as long as it did so in military operations in another country such as Iraq or Afghanistan.⁶⁸ Spying and

(2009), also involved physical detention. The plaintiff Iqbal, a Pakistani Muslim who was arrested in the aftermath of 9/11, pleaded guilty to the crime of fraud, and was ultimately removed from the United States, sued a number of federal officials, including former Attorney General John Ashcroft and FBI Director Robert Mueller, whom he alleged had violated his constitutional rights by discriminatorily subjecting him and other Arab Muslims to "harsh conditions of confinement." *Id.* at 1942–43. By a vote of five to four, in an opinion by Justice Anthony Kennedy, the Court ordered dismissal of the claims against Ashcroft and Mueller on the ground that they were not sufficiently "plausible" to survive a motion to dismiss for failure to state a claim on which relief could be granted. *Id.* at 1950–51 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined. *Id.* at 1954 (Souter, J., dissenting). Justice Breyer also filed a separate dissent. *Id.* at 1961 (Breyer, J., dissenting).

65. See, e.g., David Kennedy, *Of War and Law* 39–41 (2006) (describing debate over implications of international law). Compare Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 *Am. J. Int'l L.* 607, 610–14 (2003) (arguing Iraq invasion violated international law), with John Yoo, *International Law and the War in Iraq*, 97 *Am. J. Int'l L.* 563, 567–75 (2003) (arguing invasion was lawful).

66. See Michael J. Glennon, *Constitutional Diplomacy* 247 (1990) (explaining that President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, was thought by Framers to prohibit President from violating law of nations); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 *Va. L. Rev.* 1071, 1090 (1985) ("The theoretical underpinnings of the Constitution, its text, and the ratification debates all reflect the contemporary understanding that the law of nations, as a part of the fundamental law of nature, implicitly limited the foreign affairs powers granted by the new constitution.").

67. See Waxman, *supra* note 34, at 1385 (reporting that "[t]he number of Afghan civilians who have been mistakenly bombed or killed by U.S. forces since September 11, 2001 is many times higher than the number of civilians erroneously detained at Guantanamo or elsewhere in fighting al Qaida and the Taliban" and that "several thousand civilians are believed to have been killed by coalition military operations during the first few months of fighting in Iraq in 2003").

68. Cf. Michael B. Mukasey, *Jose Padilla Makes Bad Law*, *Wall St. J.*, Aug. 22, 2007, at A15 ("[O]ne unintended outcome of a Supreme Court ruling exercising jurisdiction over Guantanamo detainees may be that, in the future, capture of terrorism suspects will be forgone in favor of killing them.").

other foreign intelligence gathering that are directed at noncitizens and conducted outside the United States also appear to lie in the unreviewable discretion of the political branches,⁶⁹ at least as long as they are in accord.⁷⁰

In identifying the pattern of the Court's decisions to date, I do not mean to imply that change could not occur. A number of suits for damages and injunctive relief brought by victims of alleged constitutional abuses are now pending in the lower courts.⁷¹ Some may succeed. Some may reach the Supreme Court. But it would be astonishing if any of the Court's rulings frontally challenge such fundamentally political decisions as those to commit (or not commit) military force to combat abroad.

A second point concerns the Court's exercise of its habeas jurisdiction. In no case to date has the Supreme Court ordered the release of even a single detainee⁷²—though it will soon be put to the test once more in a case currently pending before it.⁷³ Decisions actually ordering the

69. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953) (“[P]rivilege against revealing military secrets . . . is well established in the law of evidence.”); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“The President . . . has available intelligence services whose reports are not and ought not to be published to the world.”); see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (“Secrecy in respect of information gathered . . . may be highly necessary, and the premature disclosure of it productive of harmful results.”).

70. The War on Terror has thus far given the Court no occasion to rule on claims of inherent executive authority to act contrary to clear congressional direction. For a recent, comprehensive discussion of the subject, see generally David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 *Harv. L. Rev.* 941 (2008) (analyzing historical practice and arguing that President has not historically exercised Article II powers in contravention of congressional dictates); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 *Harv. L. Rev.* 689 (2008) (discussing precedential, textual, and historical considerations implicating scope of President's power to act contrary to congressional command under “inherent” Article II powers).

71. See, e.g., *al-Kidd v. Ashcroft*, 580 F.3d 949, 952, 977 (9th Cir. 2009) (allowing claim for allegedly unlawful preventive detention under the material witness statute to proceed); *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 951 (9th Cir. 2009) (presenting statutory claims to relief for alleged torture); *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1016–18 (N.D. Cal. 2009) (involving claims to damages against Bush Administration official for alleged constitutional violations against former detainee).

72. The lower courts have ordered that some detainees be released, however. See, e.g., *Boumediene v. Bush*, 579 F. Supp. 2d 191, 199 (D.D.C. 2008) (ordering that five of six *Boumediene* petitioners be released “forthwith” after finding government failed to establish that they were enemy combatants); Peter Finn, *Administration Won't Seek New Detention System*, *Wash. Post*, Sept. 24, 2009, at A10 (citing statistics compiled by detainee attorney David Remes indicating that district courts have granted thirty of thirty-eight habeas petitions brought by Guantanamo detainees, but noting that twenty such detainees remain in Guantanamo pending identification of a country willing to admit them).

73. The petitioners in *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), cert. granted, 130 S. Ct. 458 (2009), are a group of Uighurs, an ethnic minority from China, who are detained at Guantanamo Bay, but whom the government acknowledges it cannot prove to be enemy combatants associated with al Qaida or the Taliban. Nevertheless, the government has continued to hold some of the Uighurs at Guantanamo Bay due to the

release of terrorist suspects would test the politically constructed bounds of judicial power in a way that rulings merely upholding judicial jurisdiction and recognizing procedural guarantees do not—and the testing would have been especially severe in the months and years immediately following 9/11. One might speculate that some of the Justices have taken cognizance of the peculiar salience that a decision ordering the actual release of suspected terrorists would likely possess and possibly also of changes in the level of public apprehension over time.

B. *George W. Bush as a Failed “Reconstructive President”*

Just as the political bounds within which the Supreme Court operates are not necessarily timeless, neither are the assumptions that guide judicial decisionmaking within those bounds. Political scientists thus speak of “regimes” of judicial decisionmaking, defined by widely shared and often tacit constitutional assumptions, just as they speak of political regimes constituted by shared assumptions about the central issues requiring resolution and the institutional frameworks within which resolution can occur.⁷⁴ A leading theorist of regimes of judicial decisionmaking, Keith Whittington, maintains that changes from one regime to another have sometimes occurred through the efforts of “reconstructive” Presidents who have challenged prevailing constitutional assumptions, in-

absence of what it regards as an acceptable alternative. The petitioners fear that they will face arrest and possible torture or execution if they are returned to China; the government has been unable to find a third country willing to accept all of them; and the Secretary of Homeland Security has declined to exercise statutory authority to admit the Uighur detainees into the United States. Under these circumstances, the district court, in the exercise of its habeas corpus jurisdiction, ordered the Uighur detainees’ release into the United States, notwithstanding the government’s opposition. See *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 43 (D.D.C. 2008), rev’d and remanded sub nom. *Kiyemba v. Obama*, 555 F.3d 1022, cert. granted 130 S. Ct. 458 (2009). The D.C. Circuit reversed, and the Supreme Court granted certiorari to determine whether the district court possessed statutory or constitutional authority to grant the remedy of release into the United States.

74. See, e.g., Whittington, *supra* note 51, at 22–25 (introducing concept of “regime” as importantly defining context in which political and judicial authority operate); see also William N. Eskridge, Jr. & John Ferejohn, Politics, Interpretation, and the Rule of Law, *in* *The Rule of Law* 268 (Ian Shapiro ed., 1994) (employing concept of regimes); John Ferejohn, Law, Legislation, and Positive Political Theory, *in* *Modern Political Economy* 191, 205–07 (Jeffrey S. Banks & Eric A. Hanushek eds., 1995) (outlining concept of judicial “interpretive regimes”); Mark Tushnet, The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration, 113 Harv. L. Rev. 29, 31 n.13 (1999) (providing background and citations on concept of regimes).

cluding those of the Supreme Court,⁷⁵ and have redefined the bounds within which acceptable rulings can occur.⁷⁶

According to Professor Whittington, Presidents Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt all succeeded in altering fundamental assumptions about the values that the Constitution embodies and the governmental actions that it permits and requires.⁷⁷ These Presidents did so partly by persuading the public to accept their visions of constitutional meaning and promise, and partly, having prevailed in the court of public opinion, by appointing Justices who shared their visions. Thus, to take perhaps the starkest example, the nearly consensus assumptions concerning the scope of congressional power under the Commerce Clause and the inappropriateness of *Lochner*-style judicial review of economic regulatory legislation that emerged from the constitutional crisis of the 1930s reflected Franklin Roosevelt's successful "reconstructive" efforts.⁷⁸

George W. Bush aspired to be a reconstructive President, at least with respect to issues of executive power.⁷⁹ Along with Vice President Dick Cheney, the second President Bush came into office believing that executive power had eroded dangerously since the 1970s.⁸⁰ Across a variety of issues, his Administration claimed executive prerogatives to act

75. See Whittington, *supra* note 51, at 54 ("The substantive vision of the Constitution that these presidents offer is explicitly different from the interpretations and practices of their immediate predecessors, but these presidents insist that theirs is an effort to save the Constitution from the mishandling of their immediate predecessors and the Court itself.").

76. See, e.g., *id.* at 22–23 (discussing capacity of "reconstructive" Presidents to construct "new political regime" with altered "constitutional and ideological norms"); see also Stephen Skowronek, *The Politics Presidents Make 36–39* (1993) [hereinafter Skowronek, *Politics*] (describing "politics of reconstruction").

77. See Whittington, *supra* note 51, at 31–40 (discussing "presidential challenges to judicial authority").

78. See, e.g., Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 *Harv. L. Rev.* 4, 120–28 (2001) (describing "New Deal settlement" that replaced previously prevailing constitutional assumptions).

79. In other respects, his ambitions—to borrow terminology from Skowronek, *Politics*, *supra* note 76, at 35–37—may have been less "reconstructive" than "affiliated" with the commitments of ideology and interest established by Ronald Reagan. And even with respect to issues of executive power, I do not mean to suggest Bush's ideas were sharply original; they appear to have grown out of ideas of a "conservative legal movement" that had been gestating since the 1970s. Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 *Harv. L. Rev.* 2070, 2073 (2009) [hereinafter, Skowronek, *Conservative Insurgency*].

Nevertheless, Bush seized on the opportunities presented to him in the aftermath of 9/11, see *infra* notes 82–85 and accompanying text, to engage in "aggressive, self-conscious advocacy" of a "construction of presidential power" that differed in important respects from received understandings. Skowronek, *Conservative Insurgency*, *supra*, at 2073.

80. See, e.g., Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 89 (2007) ("Vice President Cheney and David Addington—and through their influence, President Bush and Alberto Gonzales— . . . shared a commitment to expanding presidential power that they had long been anxious to implement."); Jane Mayer, *The Dark Side* 7 (2008) (noting Cheney's long-held views and reporting that "[he]

without congressional authorization, and even to ignore attempted congressional restrictions on presidential power.⁸¹ Yet a President cannot reconstruct widely held constitutional assumptions by dogmatic assertion alone. A would-be reconstructive President can succeed only through sustained and successful efforts to persuade the public, opinion leaders, and the bench and bar to adopt a revised vision of constitutional ideals, needs, or possibilities.

The terrorist attacks of 9/11 offered George W. Bush an opportunity for reconstructive presidential leadership that dry academic theories of executive power, such as that of a “unitary executive,”⁸² could not otherwise have afforded. After 9/11, in both political and legal venues, the Bush Administration advanced a vision of expert, decisive, and capacious presidential leadership as both constitutionally authorized and necessary to preserve domestic security in a terrifying world.⁸³ The terrorist threat,

told Bush, who later repeated the line, that if nothing else they must leave the office stronger than they found it”).

81. See, e.g., Goldsmith, *supra* note 80, at 85–86 (describing White House attitudes as reflected in President’s signing statement concerning how he would construe 2005 Detainee Treatment Act); Mayer, *supra* note 80, at 45–46, 268, 328 (reporting public and private positions of Bush Administration lawyers and senior officials); Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* 122 (2007) (“[A]s far as the executive branch was concerned, the modest boundaries on Bush’s wartime authority that Congress had tried to impose in its September 14 resolution were meaningless.”); Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 *Ohio St. L.J.* 391, 391–92 (2008) [hereinafter Lobel, *Conflicts*] (summarizing Bush Administration legal memoranda and public statements claiming executive authority to conduct war free of congressional intervention).

82. See generally, e.g., Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power From Washington to Bush* (2008) (tracing history of presidential claims of constitutional authority to administer a unitary Executive Branch without hindrance from congressional attempts to put executive officers beyond presidential control); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 *Ark. L. Rev.* 23 (1995) (arguing that post-New Deal changes in domestic and international affairs compel creation of stronger, more unitary Executive); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153 (1992) (discussing interrelation of “unitary executive” debates under Article II and jurisdiction-stripping debates under Article III); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1, 2–4 (1994) (arguing that while unitary executive theory is not consistent with originalism, unitariness is normatively desirable in light of changed circumstances).

In its original incarnation, the unitary executive theory held that the Constitution contemplates presidential control over the entire Executive Branch, and that congressional efforts to limit the President’s power to control subordinates are therefore unconstitutional, but did not attempt to specify the domain of inherent executive authority to act in the absence of statutory authority or even in contravention of statutory commands. For a developmental account of unitary executive theory, see generally Skowronek, *Conservative Insurgency*, *supra* note 79.

83. See Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 *Harv. L. Rev.* 65, 100–03 (2006) (laying out Bush Administration’s public positions).

the Bush Administration argued, required a potent and relatively unencumbered executive hand, necessarily operating in secret and sometimes “work[ing] . . . the dark side”⁸⁴ to fight the forces of evil. The Constitution, President Bush and his Administration maintained, gave the President all the powers that the times required, notwithstanding the contrary views reflected in misguided liberal scholarship, some short-sighted congressional legislation, and occasional erroneous decisions by the Supreme Court.⁸⁵

In the near aftermath of 9/11, it was wholly imaginable that the Bush Administration’s reconstructive vision might carry the day.⁸⁶ Wars and emergencies furnish ripe conditions for reconstructive presidential leadership. Lincoln used the crisis of secession and Civil War to reconstruct prevailing assumptions about the scope of national and presidential power.⁸⁷ Franklin Roosevelt won broad acceptance for his constitutional vision in the context of the Great Depression.⁸⁸

Justice Thomas’s separate opinion in *Hamdi v. Rumsfeld* pellucidly reflected the assumptions that the Bush Administration would have wished to see guide judicial assessments of executive authority to confront terrorist threats:

The Founders intended that the President have primary responsibility—along with the necessary power—to protect the na-

84. See Dan Froomkin, Cheney’s ‘Dark Side’ Is Showing, Wash. Post White House Watch, Nov. 7, 2005, at <http://www.washingtonpost.com/wp-dyn/content/blog/2005/11/07/BL2005110700793.html> (on file with the *Columbia Law Review*) (quoting post-9/11 comment of Vice President Cheney that “[w]e also have to work, though, sort of the dark side, if you will”).

85. See, e.g., Goldsmith, *supra* note 80, at 85–90 (summarizing views of Vice President Cheney and David Addington concerning scope of executive power); Mayer, *supra* note 80, at 45–46, 268, 328 (describing positions on scope of executive power developed by Administration lawyers); Savage, *supra* note 81, at 124–25 (outlining view of “Bush-Cheney legal team” that “statutes and treaties that restrict what the military and other security forces can do are unconstitutional” and that “only the commander in chief could decide how the executive branch should go about defending America”); John Yoo, *War by Other Means: An Insider’s Account of the War on Terror* 102–04, 113, 168–87 (2006) (defending broad vision of constitutional scope of executive power and defending broad executive authority to respond to terrorist threats); Lobel, *Conflicts*, *supra* note 81, at 391–92 (summarizing expansive Bush Administration claims of executive authority).

86. Cf. Cass R. Sunstein, *Minimalism at War*, 2004 Sup. Ct. Rev. 47, 60–65 (noting that in years following 9/11, “National Security Maximalism”—a position largely consistent with that of Bush Administration—“played a large role on [sic] the lower federal courts”).

87. See Whittington, *supra* note 51, at 23–24 (describing how Lincoln, among other reconstructive Presidents, was “well positioned to remake the inherited order”); see also Skowronek, *Politics*, *supra* note 76, at 198–227 (describing Abraham Lincoln’s “reconstruction” of the political order); Rogers M. Smith, *Legitimizing Reconstruction: The Limits of Legalism*, 108 Yale L.J. 2039, 2059–60 (1999) (acknowledging Lincoln’s constitutional reconstruction while questioning Lincoln’s own awareness of its magnitude).

88. See Whittington, *supra* note 51, at 22–24, 56–58, 61–65 (describing Roosevelt’s reconstructive vision and his pursuit of it); see also Skowronek, *Politics*, *supra* note 76, at 288–324 (charting Roosevelt’s “reconstruction” of the political order).

tional security and to conduct the Nation's foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains. "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks." The principle "ingredien[t]" for "energy in the executive" is "unity." This is because "[d]ecision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number."

....

I agree with the plurality that the Federal Government has power to detain those that the Executive Branch determines to be enemy combatants. But . . . [i]n my view, the structural considerations discussed above, as recognized in our precedent, demonstrate that we lack the capacity and responsibility to second-guess [an executive branch] determination [that a particular detainee is in fact an enemy combatant].⁸⁹

Strikingly, however, not a single other Justice joined Justice Thomas's *Hamdi* opinion, and Justice Thomas also found himself in dissent in *Rasul*,⁹⁰ *Hamdan*,⁹¹ and *Boumediene*.⁹² To be sure, the decisions in the latter three cases came by bitterly divided votes of 6-3, 5-3, and 5-4. Their outcomes thus reflect a measure of fortuity. If, for example, Justice Souter or Stevens had retired during George W. Bush's presidency, and if President Bush had had one more Supreme Court appointment, then *Hamdan* and *Boumediene* would most probably have come out differently. But even if the Bush Administration had prevailed in those cases, George W. Bush would not have counted as a reconstructive President without having achieved far more sweeping recognitions of inherent executive authority than a reversal of the outcomes in two habeas corpus cases presenting relatively narrow issues would have given him. At the time of *Hamdan* and even of *Boumediene*, which came late in Bush's presidential term, he still had not won the requisitely broad, deep acceptance of his

89. *Hamdi v. Rumsfeld*, 542 U.S. 507, 580–81, 589 (2004) (Thomas, J., dissenting) (citations omitted) (quoting *The Federalist* No. 70, at 471–72 (Alexander Hamilton) (J. Cooke ed., 1961)). This passage echoed the Bush Administration's brief in *Hamdi*, which similarly advanced a unitary conception of the Executive and argued that courts lack institutional competence to conduct individualized review of executive branch detainee determinations. See Brief for the Respondents at 13 & n.4, *Hamdi*, 542 U.S. 507 (No. 03-6696) (quoting *The Federalist* No. 70 (Alexander Hamilton), *supra*, at 471–72); *id.* at 26 ("A court's review of a habeas petition filed on behalf of a captured enemy combatant in wartime is of the 'most limited scope,' and should focus on whether the military is authorized to detain an individual that it has determined is an enemy combatant." (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 797 (1950) (Black, J., dissenting))).

90. *Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Scalia, J., joined by Rehnquist, C.J. & Thomas, J., dissenting).

91. *Hamdan v. Rumsfeld*, 548 U.S. 557, 678 (2006) (Thomas, J., dissenting).

92. *Boumediene v. Bush*, 128 S. Ct. 2229, 2279 (2008) (Roberts, C.J., joined by Scalia, Thomas & Alito, JJ., dissenting).

constitutional vision that constitutional reconstruction would have required. On this point, the result of the 2008 presidential election left no doubt. In order to win, Barack Obama did not need to embrace Bush's constitutional vision. When Obama attained the White House, it was politically open to him, as it remains politically open to him, to appoint Justices who might reject the Bush Administration's broad claims of inherent executive authority in matters of war and national security. By contrast, at the end of Franklin Roosevelt's tenure, it seems inconceivable that the American people would have elected a President who pledged to appoint Supreme Court Justices embracing *Lochner*-era jurisprudential assumptions.⁹³

C. *The Supreme Court as a "They," Not an "It"*

In discussing the Supreme Court's pattern of decisions in War on Terror cases, commentators too easily fall into generalizations about how "the Court's" approach reflects predictable continuities with or surprising departures from what "the Court" has done in the past. References to "the Court" can obscure the otherwise obvious point that "the Court" is not a monolith, but an aggregation of nine individual Justices. Each exer-

93. See generally Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 232 (2009) (noting that by 1937 public sentiment was sufficiently aligned with Roosevelt's constitutional views that "[i]f the public had not observed the Court switch direction" and acquiesced to Roosevelt's position, Congress would have approved a plan to let him pack the Court with supportive justices); Kramer, *supra* note 78, at 12 (describing a "New Deal settlement" concerning the scope and limits of judicial power that "proved stable for more than half a century"). A further measure of the failure of the Bush Administration's reconstructive ambition lies in the post-*Boumediene* pattern of lower court decisions. Both the District Court and the Circuit Court of Appeals for the District of Columbia have rejected executive branch stances on detainee litigation matters involving (1) substantive law, see *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009) (holding that government's detention authority extends only to individuals who were "part of" enemy groups, and not to individuals who simply "supported" such groups); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 75–76 (D.D.C. 2009) (same); (2) discovery, see *Al Odah v. United States*, 559 F.3d 539, 545 (D.C. Cir. 2009) (rejecting government's contention that its certification that information redacted from classified documents does "not support a determination that the detainee is *not* an enemy combatant" is sufficient to establish information's immateriality); *Mohamed v. Gates*, 624 F. Supp. 2d 40, 44 (D.D.C. 2009) (requiring government to disclose all habeas petitioner's statements on which it intended to rely to justify his continued detention in order to provide meaningful opportunity for petitioner to discuss them with counsel); and (3) evidentiary standards, see *Parhat v. Gates*, 532 F.3d 834, 850 (D.C. Cir. 2008) ("We merely reject the government's contention that it can prevail by submitting documents that read as if they were indictments or civil complaints, and that simply assert as facts the elements required to prove that a detainee falls within the definition of enemy combatant."); *Bostan v. Obama*, Civil Action Nos. 05-883 (RBW), 05-2386 (RBW), 2009 WL 2516296, at *6 (D.D.C. Aug. 19, 2009) (holding that, to admit hearsay into evidence during Guantanamo detainee proceedings, government must either establish that proffered evidence would be admissible under Federal Rules of Evidence, or meet two-part test by establishing both that proffered hearsay is reliable and that provision of non-hearsay evidence would unduly burden the government).

cises personal judgment. Each may hold distinctive, occasionally idiosyncratic, views. In a phrase, the Supreme Court “is a ‘they,’ not an ‘it.’”⁹⁴

Viewed in the sweep of history, the Supreme Court’s membership is a variable, not a constant. So is its ideological balance. But so long as the Court divides roughly as it has so far in War on Terror cases, Justice Kennedy will most often be the median Justice. Alone among his colleagues, Justice Kennedy has voted with the majority in every single habeas case stemming from the War on Terror.⁹⁵ Justice Stevens may have signaled his recognition of Justice Kennedy’s outcome-controlling influence when he declined to join three “liberal” colleagues in voting to grant certiorari in the *Boumediene* case as long as Justice Kennedy opposed a grant.⁹⁶ Then, when Justice Kennedy changed his mind, Justice Stevens shifted his vote too,⁹⁷ possibly in anticipation that Kennedy would ally himself with the Court’s four liberals in holding that the Suspension Clause guarantees the writ of habeas corpus to noncitizen detainees at Guantanamo Bay. I shall say more about Justice Kennedy’s jurisprudential style, and its likely effect on particular decisions, in Part II.

For now, however, I want to emphasize that all of the Justices must decide for themselves how much significance to accord the Court’s precedents along both of two dimensions. They must decide how broadly or narrowly to read cases with which they disagree.⁹⁸ They must further determine when to vote to overturn past decisions.⁹⁹ When the Justices di-

94. Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. Contemp. Legal Issues 549, 549 (2005) (echoing Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 Int’l Rev. L. & Econ. 239, 239 (1992)).

95. See *supra* note 2 for a description of each of the Court’s War on Terror-related habeas cases to date.

96. See *Boumediene v. Bush*, 127 S. Ct. 1478, 1478 (2007) (denying certiorari); *id.* (Stevens & Kennedy, JJ., respecting denial of certiorari) (asserting that traditional rules calling for avoidance of unnecessary constitutional questions and exhaustion of administrative remedies “make it appropriate to deny these petitions at this time”). Commentators speculated at the time that Justice Stevens’s thinking was at least partly tactical. See, e.g., Linda Greenhouse, *Supreme Court Turns Down Detainees’ Habeas Corpus Case*, N.Y. Times, Apr. 3, 2007, at A18 (“Justice Stevens . . . knew that providing a fourth vote to hear the case without assurance of Justice Kennedy’s position risked putting [the Court’s liberal members] on track to the wrong destination.”).

97. See *Boumediene v. Bush*, 127 S. Ct. 3078 (2007) (granting petition for rehearing and granting certiorari).

98. See, e.g., Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, 98–109 (1991) (discussing factors that guide Supreme Court’s choice of method by which to weaken disagreeable precedents); David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731, 734 & n.13 (1987) (citing Karl Llewellyn, *The Bramble Bush* 74–75 (1951)) (discussing bounded scope of judges’ latitude to distinguish unfavorable precedent). Professor Dworkin describes the narrowing of precedent as a restriction of a decision to its “enactment force.” Ronald Dworkin, *Taking Rights Seriously* 121–23 (1977).

99. The general literature on constitutional precedent or *stare decisis* is voluminous. Important contributions include Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1 (1989) (elucidating and assessing strengths of models of practice for application of

vide as closely and passionately as they have in the Court's major War on Terror cases, it is unrealistic to expect the Justices who dissented in *Boumediene*, for example, to feel bound by it in subsequent cases.¹⁰⁰ Similarly, if future Justices should think *Boumediene* gravely mistaken, they would likely seize opportunities to narrow or even overrule it. If *Boumediene* looks safe from overruling, or is thought a likely predicate for a future holding that the Suspension Clause guarantees the availability of habeas to at least some noncitizens detained overseas, the case's future significance arises less from the doctrine of stare decisis than from the election of Barack Obama, rather than John McCain. With the Supreme Court being "a 'they,' not an 'it,'" elections matter enormously in determining who "they" are.¹⁰¹

precedent); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 Duke L.J. 503 (2000) (examining scope of congressional authority over norms for application of precedent); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988) (discussing stare decisis's importance in explaining originalism's inability to provide plausible descriptive account of constitutional order); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 Va. L. Rev. 1 (2001) (arguing that weak version of stare decisis can still provide judicial consistency); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 Yale L.J. 1535 (2000) (arguing that stare decisis is a "policy" susceptible to abrogation by Congress); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571 (1987) (exploring arguments for precedent rooted in fairness, predictability, strengthened decisionmaking, and stability); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 Tex. L. Rev. 929 (2008) (exploring difficulties confronting effort to devise general theory of stare decisis). My previous efforts to contribute to the literature on stare decisis include Fallon, *Constitutional Precedent*, supra note 56 (interpreting stare decisis practice through lens of Hartian jurisprudence), and Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570 (2001) (arguing practice of stare decisis is of constitutional stature).

100. See Posner, *How Judges Think*, supra note 60, at 80 (observing that the "weaker a judge's political preference for a particular outcome in a case, the stronger will be the tug of legalist considerations the other way").

101. The fortuity of Presidents having the opportunity to make appointments, and especially the opportunity to make appointments that seem likely to shift the Court's ideological balance, is obviously an important variable that makes some elections more important for this purpose than others. President Obama's recent selection of Sonia Sotomayor to replace David Souter is widely expected to have little impact on the Court's overall balance and direction. See, e.g., Adam Liptak, *Justices Allow Execution, with Sotomayor Opposed*, N.Y. Times, Aug. 19, 2009, at A13 ("But the alignment of the justices in the Gitsy case gave a preliminary indication that, as expected, the ideological fault line at the court was not changed by Justice Sotomayor's succeeding Justice David H. Souter, who often voted with Justices Stevens, Ginsburg and Breyer."); Jonathan Weisman, *Hispanic Picked for Top Court*, Wall St. J., May 27, 2009, at A1 ("Judge Sotomayor would be unlikely to shift the court's ideological balance."). By contrast, the balance of judicial power might have shifted considerably if John McCain had won a sweeping victory in 2008, and had been able to make good on his pledge to appoint more conservative Justices. See, e.g., Neil A. Lewis, *Stark Contrasts Between McCain and Obama in Judicial Wars*, N.Y. Times, May 28, 2008, at A17 ("Senator John McCain of Arizona . . . has already asserted that if elected he would reinforce the conservative judicial counterrevolution that began

II. DOCTRINE TO EMERGE FROM THE WAR ON TERROR

In discussing the habeas corpus doctrine that has emerged from the War on Terror, I shall distinguish among issues involving (1) jurisdiction, or the power of a court to say what the law is, (2) entitlements to be free from executive detention as a terrorist or terrorist suspect without judicial trial on criminal charges, and (3) procedural rights to a fair determination of whether a prisoner has a substantive right not to be detained unless tried and convicted.

A. *Jurisdiction*

With respect to jurisdiction, *Boumediene v. Bush* is easily the most important War on Terror case that the Supreme Court has decided thus far. The reasons extend far beyond the decision's specific facts. Building on dicta in prior cases, *Boumediene* clearly held, for the first time, that the Suspension Clause protects a right to habeas at least as broad as that which existed in 1789, and that it does not merely prohibit complete withdrawals of whatever habeas rights Congress might have chosen to provide at any particular time.¹⁰² As recently as June 2001, the utterance of these propositions in dictum had occasioned a five-to-four division among the Justices in *INS v. St. Cyr*,¹⁰³ with Justice Scalia writing a passionate dissent.¹⁰⁴ But Justice Scalia appears to have changed his mind. In *Boumediene*, neither of the dissenting opinions contested the premise that the Suspension Clause protects a minimum core of jurisdiction. This premise thus seems settled, and not very vulnerable (at least for the time being) to the protest that the Supreme Court is a potentially changing "they," not an "it."

Justice Kennedy's opinion did not, however, tie the Suspension Clause's guarantees to the state of affairs that existed in 1789. The Court, he wrote, "has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ."¹⁰⁵ In *Boumediene* itself, Justice Kennedy began with originalist analysis,¹⁰⁶ but shortly concluded that historical materials yielded no clear answer to the question before the Court. Having done so, he undertook a more purposive or functional inquiry. From his survey of the Court's past cases, Justice

with President Ronald Reagan by naming candidates for the bench with a reliable conservative outlook.").

102. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2248 (2008) ("But the analysis may begin with precedents as of 1789, for the Court has said that 'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified.").

103. 533 U.S. 289 (2001).

104. See *id.* at 338–40 (Scalia, J., dissenting) (arguing Suspension Clause guards against outright suspension of writ of habeas corpus rather than modification of writ's substance).

105. *Boumediene*, 128 S. Ct. at 2248.

106. See *id.* at 2244–47 (discussing historical provenance of Suspension Clause).

Kennedy distilled three considerations that he then weighed to hold that the Guantanamo petitioners had a constitutional right of access to habeas corpus: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”¹⁰⁷

Justice Scalia’s dissenting opinion chastised the majority for venturing away from strict originalism.¹⁰⁸ Absent decisive evidence that the writ would historically have extended to noncitizens in a territory such as Guantánamo Bay, he—joined by Chief Justice Roberts and Justices Thomas and Alito—argued that the petitioners’ Suspension Clause challenge must fail.¹⁰⁹ Justice Scalia also criticized the majority for refusing to disavow the position that the protections afforded by the Suspension Clause might have expanded beyond the 1789 baseline¹¹⁰—a question that the Court purported to avoid with its assertion that the historical materials were inconclusive¹¹¹ and that the decision must therefore rest on other bases.

The Justices’ points of agreement and disagreement in *Boumediene* establish the framework within which future disputes about the constitutionally mandated scope of habeas jurisdiction are likely to play out. By consensus, courts now must ask first whether a detainee claiming a constitutional entitlement to habeas would have had access to the writ in 1789. If so, then the Suspension Clause guarantees the availability of the writ today. If it is not clear whether a court would have had jurisdiction to issue the writ in 1789, then a court will conduct the three-factor analysis prescribed in *Boumediene*. Finally, if habeas jurisdiction would not have existed in 1789, the question must be confronted whether subsequent developments may have created a constitutional entitlement in the current day.

Within the framework that *Boumediene* establishes,¹¹² both history and judicial precedents suggest that three distinctions possess recurring

107. *Id.* at 2259.

108. See *id.* at 2297–98 (Scalia, J. dissenting) (criticizing majority’s separation of powers rationale as unmoored from Constitution’s original meaning).

109. See *id.* at 2297 (“The Court admits that it cannot determine whether the writ historically extended to aliens held abroad, and it concedes (necessarily) that Guantanamo Bay lies outside the sovereign territory of the United States. . . . If that is so, the Court has no basis to strike down the Military Commissions Act, and must leave undisturbed the considered judgment of the coequal branches.”).

110. See *id.* (“The writ as preserved in the Constitution could not possibly extend farther than the common law provided when that Clause was written.”).

111. See *id.* at 2251 (majority opinion) (“We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on point.”).

112. For criticism of *Boumediene* on the ground that it confuses the question of whether the Constitution applies with the question of whether and how an applicable constitutional guarantee should be enforced, see Christina Duffy Burnett, A Convenient Constitution? Extraterritoriality After *Boumediene*, 109 Colum. L. Rev. 973 (2009).

significance. The first is a distinction between citizens and noncitizens. In some circumstances, the Constitution may mandate that citizens have access to habeas when it imposes no parallel requirement with respect to noncitizens. A second distinction exists between detentions in the United States and those occurring abroad. A third is between statutorily authorized and constitutionally mandated jurisdiction. Because Congress has undoubted authority to confer a habeas jurisdiction broader than the Constitution requires, the first question in every case is whether statutory jurisdiction exists.¹¹³ If not, the question remains whether the Constitution confers a right of access to the writ.¹¹⁴

1. *Cases Involving Citizens.* — Since the War on Terror began, the Supreme Court has implicitly affirmed that any citizen detained without trial in the United States is entitled to seek the Great Writ or some constitutionally adequate substitute from a federal court. The implicit affirmation came in the Court's first set of War on Terror cases, when all of the Justices took the existence of jurisdiction for granted in *Hamdi v. Rumsfeld*, which involved a United States citizen who had been seized abroad, but then transported to the United States for detention as an enemy combatant.¹¹⁵ *Rumsfeld v. Padilla*, which dismissed a petition for want of jurisdiction, predicated its ruling—that a federal district court in New York could not exercise jurisdiction—on the availability of jurisdiction in a federal court in South Carolina.¹¹⁶

Pre-War on Terror authority had also made clear that federal habeas is available to citizens detained by federal officials outside the United States,¹¹⁷ as the Constitution probably mandates that it must be.¹¹⁸ In *Munaf v. Geren*, a unanimous Supreme Court both accepted and modestly extended the earlier precedents by holding that the general federal habeas statute¹¹⁹ conferred jurisdiction over the petitions filed by two citizens detained by the U.S. military in Iraq while acting as part of a multinational force there.¹²⁰

Munaf needs to be read in conjunction with *Boumediene*, in which Justice Kennedy's three-part functional test for the constitutional neces-

113. See Fallon & Meltzer, *supra* note 9, at 2038–39 (discussing intersecting statutory and constitutional dimensions of habeas jurisdiction).

114. See *id.*

115. See, e.g., 542 U.S. 507, 585 (2004) (Thomas, J., dissenting) (“I acknowledge that the question whether Hamdi’s executive detention is lawful is a question properly resolved by the Judicial Branch . . .”).

116. 542 U.S. 426, 451 (2004).

117. See *Burns v. Wilson*, 346 U.S. 137, 138–39 (1953) (asserting jurisdiction over habeas petitions by service members sentenced to death by U.S. Army courts martial in Guam).

118. See Fallon & Meltzer, *supra* note 9, at 2054–55 (arguing extraterritorial habeas jurisdiction is compelled by constitutional mandate that U.S. citizens have forum to challenge executive detention).

119. 28 U.S.C. § 2241(c)(1) (2006).

120. 128 S. Ct. 2207, 2213 (2008).

sity of habeas jurisdiction implies that even a citizen could not invoke the jurisdiction of a habeas court under circumstances in which “the nature of the sites where apprehension and then detention took place . . . and . . . the practical obstacles inherent in resolving the prisoner’s entitlement to the writ” would make judicial inquiry dangerously intrusive or burdensome.¹²¹ But limitations such as these inhere in habeas’s status as an equitable writ.¹²² In determining the constitutional necessity of the writ’s availability, *Boumediene* affirms what *Hamdan* and *Munaf* presuppose: Absent exigent circumstances, citizens who have been detained without trial have a right of access to the writ.

The Court’s War on Terror decisions upholding habeas jurisdiction in cases involving U.S. citizens have, thus, mostly fallen within the category of business as usual. The Court’s performance accords entirely with what a legal doctrinalist, prior to 9/11, would have predicted. In that sense, it reflects a triumph of rule of law values.

2. *Cases Involving Noncitizens.* — With respect to noncitizens, the Supreme Court issued one of its most important decisions on the scope of federal habeas jurisdiction in a case decided shortly before the War on Terror began, *INS v. St. Cyr*.¹²³ Although *St. Cyr* ultimately rested on statutory grounds in holding that federal habeas jurisdiction extended to an alien held in the United States,¹²⁴ the majority concluded that the writ would have been available to noncitizens within the country’s borders in 1789,¹²⁵ and it said in dictum that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”¹²⁶ The Court’s more recent *Boumediene* decision converts *St. Cyr*’s dictum that the Suspension Clause guarantees habeas jurisdiction at least as broad as that which existed in 1789 into a constitutional holding.¹²⁷ By doing so,

121. *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008).

122. See, e.g., *id.* at 2274–77 (acknowledging prudential considerations, such as national security concerns, limit reach of writ, but finding that cases under review did not sufficiently implicate such considerations); *Munaf*, 128 S. Ct. at 2220–21 (“Habeas corpus is governed by equitable principles. We have therefore recognized that ‘prudential concerns,’ such as comity and the orderly administration of criminal justice, may ‘require a federal court to forgo the exercise of its habeas corpus power.’” (internal quotation marks omitted)) (citations omitted)).

123. 533 U.S. 289 (2001).

124. See *id.* at 314 (“[T]he absence of [an alternative judicial] forum, coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions. Accordingly, we conclude that habeas jurisdiction . . . was not repealed” (citation omitted)).

125. See *id.* at 301–02 (“In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens.”).

126. *Id.* at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)).

127. *Boumediene*, 128 S. Ct. at 2248 (quoting *St. Cyr*, 533 U.S. at 301).

Boumediene leaves no doubt that the Constitution mandates the availability of habeas to noncitizens detained in the United States.

The most litigated jurisdictional question so far has involved whether habeas extends to noncitizens detained at Guantanamo Bay. Twice the Supreme Court has answered that question in the affirmative, both times by sharply divided votes. In *Rasul v. Bush*, Justice Stevens distinguished a World War II-era case arising from the detention of German nationals in occupied Germany in order to hold that statutory jurisdiction existed.¹²⁸ In *Boumediene v. Bush*, after Congress had attempted to withdraw the jurisdiction that *Rasul* upheld, Justice Kennedy wrote for the majority in ruling that noncitizens held at Guantanamo have a constitutionally mandated right of access to the writ under the Suspension Clause.¹²⁹

Following *Boumediene*, the great, pending jurisdictional question is whether the majority's reasoning extends to noncitizens held by the United States in foreign territory over which the United States does not exercise the complete and permanent de facto authority that it has over Guantanamo Bay.¹³⁰ As I have noted already, the Court's *Rasul* opinion sent mixed messages with respect to this issue,¹³¹ and *Boumediene* gives it no clear resolution, either. For as long as Justice Kennedy remains the Court's "swing" Justice, however, I would expect a Court majority—in the absence of developments heightening the perceived urgency of the terrorist threat—to rule that the Suspension Clause at least sometimes mandates the availability of federal habeas to noncitizens abroad. In light of the three-part functional test laid out in *Boumediene*, I would further expect the Court's majority to make its decisions based on relatively ad hoc assessments of practicability and the utility of federal habeas review in promoting rule of law values. But I could be wrong in this speculation. No language in *Boumediene* would foreclose the Court from adopting a presumption that the practical obstacles to judicial inquiries into the de-

128. 542 U.S. 466, 476–78, 481 (2004) (distinguishing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

129. 128 S. Ct. at 2262.

130. In a case presenting this issue, *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 208 (D.D.C. 2009), Judge John Bates has ruled that three detainees who claim to have been captured outside Afghanistan, and then transported and detained there, have the same right of access to habeas as detainees at Guantanamo Bay. Judge Bates characterized his ruling as "quite narrow," *id.*, and said that it depended on a case-by-case application of the factors that the Supreme Court's *Boumediene* opinion identified as relevant, *id.*, and would not apply to all detainees held by the United States anywhere in the world. *Id.* at 231–32. Indeed, pursuant to a multifactor analysis, Judge Bates denied relief to the sole petitioner detainee in the case before him who was an Afghan citizen on the ground that issuance of the writ could provoke tension with the Afghan government. *Id.* at 230–31. Judge Bates's ruling that *Boumediene*'s protections reach beyond Guantanamo Bay is under appeal to the D.C. Circuit. See *Al Maqaleh v. Gates*, 620 F. Supp. 2d 51, 58 (D.D.C. 2009) (staying order pending appeal).

131. See *supra* note 17 and accompanying text.

tention of noncitizens overseas are too great for courts to assert jurisdiction absent unusual circumstances.¹³²

3. *General Observations.* — Looking at the package of jurisdictional questions that the Court has answered, as well as at those that remain unresolved, I would venture three comments. All accord with the lessons of recent work in political science.

First, in this area of the law, even the Justices who have voted to extend the reach of judicial power seem aware of the politically constructed boundaries of judicial authority. None of the Court's War on Terror cases has even hinted at the possibility of relief for noncitizens abroad whose grievances do not involve detention as an enemy combatant or terrorist suspect. Further, with respect to habeas, the only noncitizen detainees to whom the Court has ruled unequivocally that the writ must extend are those held either in the United States or at Guantanamo Bay.¹³³ Recent Court opinions have also emphasized that the reach of habeas jurisdiction depends on practical considerations and that courts can sometimes deny relief, and presumably decline even to exercise jurisdiction, on equitable grounds.¹³⁴

The Court's caution to date does not, of course, guarantee future caution in all relevant respects. Although the Justices apprehend that they can exercise authority successfully only at the margins of the political branches' prosecution of a War on Terror—especially outside the United States—the Court has not foreclosed the assertion of jurisdiction to review American detentions of noncitizens in other nations.¹³⁵ In considering whether to assert such jurisdiction, moreover, some of the Justices may perceive a shifting of the politically constructed bounds within which judicial review could function effectively between the near aftermath of 9/11—when it was virtually unthinkable that the Court might hold that the Constitution guarantees the writ of habeas corpus to noncitizen detainees in Afghanistan—and the present day. *Boumediene's* equivocal suggestion that habeas jurisdiction could potentially expand to noncitizens worldwide may so signify.

Second, the realistic possibility that the Court might uphold habeas jurisdiction to review the detentions of foreigners held abroad epitomizes the failure of George W. Bush's ambition to reconstruct constitutional understandings of unreviewable executive discretion in matters involving national security. The Court has not retreated from any prior jurisdictional rulings. Some expansion has come. More may loom.

132. See Detlev F. Vagts, *Military Commissions: Constitutional Limits on Their Role in the War on Terror*, 102 *Am. J. Int'l L.* 573, 577 (2008) (asserting pre-*Boumediene* precedent rejecting claim of entitlement to habeas corpus "probably is still valid for foreigners held in a truly alien territory").

133. See *Boumediene*, 128 S. Ct at 2262 (holding writ extends to Guantanamo).

134. See *supra* note 122.

135. See *supra* notes 130–131 and accompanying text.

Third, the Court is a “they,” not an “it,” and how far, if at all, the Court will extend its jurisdiction to noncitizens held by the military outside the United States and Guantanamo Bay will depend on the judgments of individual Justices about where and how to draw lines. In the short term, Justice Kennedy will likely cast the decisive vote. His decision-making will reflect many variables, including, one would guess, his sense of the justice and practicalities of varied situations and of the evolving moral sensibilities of the American people. As noted above, Justice Kennedy’s approach to determining when, and to what extent, constitutional guarantees apply to noncitizens outside the United States requires context-sensitive judgments.¹³⁶ Moreover, as others have observed, Justice Kennedy’s decisionmaking seems notably responsive to what he perceives as the public’s sense of right and fairness.¹³⁷ If Justice Kennedy is the median Justice, and if his positions tend to vary with changing public attitudes, then we will have a Court whose positions will shift with public opinion and with the developments in the world to which public opinion responds.

In one way, I find it disturbing that legal scholars trying to predict future Supreme Court jurisdictional rulings—like other observers—would need to turn their attention to the likely psychological reactions and thought processes of Justice Kennedy. At least at first blush, the ideal of “a government of laws, and not of men,”¹³⁸ sits uneasily with the thought that the outcome of constitutional cases may depend on nothing more impersonal than individual psychology. But it is hard to imagine any plausible account of legal reasoning in which judges’ and Justices’ worldviews, including their values, do not affect their decisionmaking. Recognition that legal outcomes might turn on the normative judgments of a single Justice can thus be as consistent with a distinctively legal as with a political scientific point of view. When legal materials such as the Constitution’s text and judicial precedents permit alternative interpretations, leading jurisprudential thinkers maintain that Justices should adopt the otherwise eligible interpretation that they regard as normatively best.¹³⁹ And reasonable Justices can obviously disagree about whether the normatively best interpretation of pertinent legal sources would man-

136. See *supra* note 107 and accompanying text.

137. See, e.g., Klarman, *supra* note 58, at 450 (describing Justice Kennedy’s “strong sensitivity to public opinion”); Thomas W. Merrill, *The Making of the Second Rehnquist Court*, 47 *St. Louis U. L.J.* 569, 629–30 (2003) (describing Justices Kennedy and O’Connor as the “two [Rehnquist Court] Justices . . . most sensitive to external forces”).

138. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

139. See, e.g., Ronald Dworkin, *Law’s Empire* 229–32 (1987) (analogizing legal interpretation to participation in a novel that has already begun in which each author must determine how best to go on); Kenneth Einar Himma, *Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States*, 4 *J.L. Soc’y* 149, 178 (2003) (“[T]he Justices are practicing a recognition norm that requires the Court to ground its validity decisions in the best interpretation of the Constitution.”).

date the availability of federal habeas jurisdiction to review the overseas detentions of noncitizens, and even of particular noncitizens under particular circumstances. It is also understandable if the Justices, to greater or lesser degrees, have internalized a sense of obligation to consider the political acceptability of their decisions as a factor bearing on what they legally ought to do in cases not clearly governed by plain constitutional text and precedent.¹⁴⁰

B. *Entitlements to Release from Detention*

The most fundamental question in habeas cases is whether a court should grant the writ and order a petitioner's release on the ground that the detention was not authorized by law. Some entitlements to release flow directly from the Constitution. Others may arise from legislation or self-executing treaties. In addition, the jurisdictional law that authorizes grants of habeas relief either acknowledges or confers a general right not to be detained by government officials except pursuant to lawful authority.¹⁴¹

1. *Citizens' Rights*. — As I noted above, in both of the War on Terror cases in which the Supreme Court has reached questions of citizens' substantive rights to be free from executive detention, the petitioners have lost.¹⁴² In *Hamdi v. Rumsfeld*, a divided Court, without a majority opinion, held that an American citizen seized on a battlefield abroad and subsequently removed to the United States had no substantive right not to be detained indefinitely as an enemy combatant.¹⁴³ In so determining, Justice O'Connor's plurality opinion rejected the view—powerfully asserted by Justice Scalia in a dissenting opinion joined by Justice Ste-

140. See Fallon, *Constitutional Precedent*, *supra* note 56, at 1140 (surmising, based on Court's pattern of decisions, that "Justices have internalized the constraint that the Court must conduct itself in ways that the public will accept as lawful and practically tolerable"); see also Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harv. L. Rev.* 4, 77–107 (2003) (exploring interplay between constitutional law and culture and arguing that some Justices, including Harlan and Kennedy, pay more careful attention to culture than do others, such as Justice Scalia); *id.* at 110 ("As can be seen from his dissents in *Hibbs*, *Grutter*, and *Lawrence*, Scalia takes indifference to popular reaction almost as a point of affirmative pride, an attitude that flows directly from his avowedly unconditional embrace of the autonomy of constitutional law.").

141. See Fallon & Meltzer, *supra* note 9, at 2065–66 ("Notwithstanding the centrality of constitutional rights in our legal culture, the original office of habeas corpus was to ask whether—even in the absence of constitutional rights in the modern sense—a petitioner's detention was authorized by law."); Neuman, *supra* note 1, at 961 (describing habeas corpus as "constitutional safeguard against unauthorized executive detention").

142. *Supra* notes 19–20 and accompanying text.

143. 542 U.S. 507, 521 (2004) (plurality opinion) ("The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'"); *id.* at 594 (Thomas, J., dissenting) ("I conclude that the Government's detention of Hamdi as an enemy combatant does not violate the Constitution.").

vens¹⁴⁴—that as long as the civilian courts remain open, a citizen initially detained by the government as an enemy combatant has a right either to be tried for a crime by a jury or to be released.¹⁴⁵ In *Munaf v. Geren*, the Court unanimously held that a citizen seized in Iraq had no substantive right not to be transferred to Iraqi authorities for criminal prosecution.¹⁴⁶

It would be a mistake, however, to make too much of *Hamdi* and *Munaf*. Although by no means unimportant, both arose from fact situations that are unlikely to recur frequently. Potentially much more important is the question whether citizens seized and then detained in the United States can be held indefinitely as enemy combatants or terrorist suspects without being tried for any crime. The Court could have resolved this question in *Rumsfeld v. Padilla*,¹⁴⁷ but a bare majority avoided doing so by holding that Padilla's lawyers had filed his habeas petition in the wrong court.¹⁴⁸ The government then brought criminal charges against Padilla in an Article III court. By doing so, the government mooted Padilla's claim that he possessed a substantive constitutional right not to be detained as a noncriminal enemy combatant.¹⁴⁹

Four Justices dissented in *Padilla*, arguing both that the Court had jurisdiction and that the petitioner deserved to prevail on the merits. Justice Stephen Breyer numbered among the four. Although he had joined the five-member majority in *Hamdi* allowing the indefinite executive detention of a citizen initially taken into custody on a foreign battlefield,¹⁵⁰ he believed that the different facts in *Padilla* called for a different outcome.¹⁵¹ As of 2004, there thus would have been five Supreme Court votes—that of Justice Breyer in addition to those of the four *Hamdi* dissenters—for the proposition that a citizen seized in the United States as an enemy combatant has a right either to be tried in a criminal court or to be released. But the Court has entered no ruling to that effect.

I would speculate that some of the Justices may have preferred to avoid a decision on the merits in *Padilla* based on an apprehension that a

144. See *id.* at 572 (Scalia, J., dissenting) ("Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release.").

145. See *id.* at 521–24 (plurality opinion) (arguing that under *Ex parte Quirin*, 317 U.S. 1 (1942), military can constitutionally detain U.S. citizens designated as enemy combatants).

146. 128 S. Ct. 2207, 2220–25 (2008).

147. 542 U.S. 426 (2004).

148. See *id.* at 451 (dismissing habeas petition as improperly filed).

149. See *Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the denial of certiorari) (arguing initiation of criminal charges against Padilla renders his claims "hypothetical").

150. 542 U.S. at 509 (plurality opinion).

151. See *Padilla*, 542 U.S. at 465 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting) ("Executive detention of subversive citizens . . . may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information.").

ruling in favor of the petitioner might prove politically intolerable in the long term, especially if the United States should suffer more terrorist calamities on the scale of 9/11 or larger. If the space for judicial review is politically constructed, the politically constructed bounds may be especially volatile in matters involving war and national security.

On this point, the contrast between the Supreme Court's decisions in *Ex parte Milligan*¹⁵² and *Ex parte Quirin*¹⁵³ may offer insight. In *Milligan*, decided in the near aftermath of the Civil War, the Court, in the course of holding that a military tribunal lacked jurisdiction to try a civilian citizen for war crimes in a state in which the ordinary courts remained open, attempted both to look backward and to lay down a new rule for the future. "During the late wicked Rebellion," when military courts were broadly used, "the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely legal question," the Court observed.¹⁵⁴ Seeking to rectify past mistakes, the *Milligan* majority held that the right to trial by jury was "the birthright of every American citizen," was fundamental to ordered liberty, and could not be denied in states where the courts continued to function.¹⁵⁵

In the midst of World War II, however, the Court retreated from *Milligan*, based on a flimsy distinction,¹⁵⁶ and upheld the use of a military commission to try a citizen apprehended within the United States and charged with war crimes. If the Court had ruled otherwise, President Roosevelt had signaled that he would defy its order.¹⁵⁷ In the wartime climate, moreover, the President would have paid scant political price for his insistence on swift military justice concluding in the execution of a traitor. Sensing a shift in the political boundaries that define and limit judicial power, the *Quirin* Court acquiesced in the assertion of presidential prerogative.¹⁵⁸

When the Supreme Court considered the *Padilla* case in 2004, it could have held that a citizen apprehended in the United States cannot be detained indefinitely as an enemy combatant without judicial trial. But no one could have predicted with assurance that subsequent events

152. 71 U.S. (4 Wall.) 2 (1866).

153. 317 U.S. 1 (1942).

154. 71 U.S. (4 Wall.) at 109.

155. *Id.* at 119.

156. Although the *Quirin* Court said that the petitioner in *Milligan*, unlike those in *Quirin*, was "not subject to the law of war," 317 U.S. at 45–46, the indictment in *Milligan* expressly charged a "[v]iolation of the laws of war," and the "substance" of the charges included "holding communication with the enemy" and "conspiring to seize munitions of war stored in the arsenals" during "a period of war and armed rebellion against the authority of the United States." 71 U.S. (4 Wall.) at 6–7.

157. See Danielski, *supra* note 57, at 69 ("[Justice Owen Roberts] told his colleague that Biddle feared that F.D.R. would execute the petitioners despite any Court action.").

158. See Fallon & Meltzer, *supra* note 9, at 2078–79 (describing and criticizing process of decision in *Quirin*).

would not provoke a replay of the *Milligan-Quirin* sequence, involving a shrinking of the political space within which the President, and ultimately the people, will accept judicial mandates as necessarily authoritative.

If I am correct that anxiety about the future political acceptability of a ruling in favor of Padilla might have influenced some of the Justices' positions on the jurisdictional issue—with Justices Kennedy and O'Connor being the most likely candidates to have been so affected¹⁵⁹—the question arises whether they were *legally* justified in basing their decisions partly on this consideration. I believe that the answer is yes. For my own part, I think the Court should have upheld jurisdiction in *Padilla*, and that it should also have held for the petitioner on the merits.¹⁶⁰ Nevertheless, in my view, Alexander Bickel offered a persuasive explication of one of the tacit norms of constitutional adjudication—which judges and Justices are expected to, and for the most part do, internalize—when he asserted that the Supreme Court “labors under the obligation to succeed.”¹⁶¹ As Bickel also wrote, speaking in a normative vein, the Justices “*should* declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent,”¹⁶² at least when they have legally plausible mechanisms for avoiding a decision on the merits.

In making this claim regarding the Justices' legal obligations and prerogatives, I rely—necessarily, I believe—on positive, empirical assumptions about the way that judges and Justices in our constitutional practice have characteristically behaved in the past and continue characteristically to behave in the present. From the beginning of constitutional history, Supreme Court decisionmaking has exhibited a streak of prudentialism, with the Justices recurrently avoiding constitutional rulings that would provoke defiance or otherwise arouse the severe and enduring enmity of a determined public.¹⁶³ Because the foundations of law necessarily lie in what is accepted as lawful within the practice of judges and other officials,¹⁶⁴ and is acquiesced to by the broader public, the practice of judges

159. See *supra* note 137 and accompanying text.

160. Fallon & Meltzer, *supra* note 9, at 2052–53.

161. Alexander Bickel, *The Least Dangerous Branch* 239 (Yale Univ. Press 1986) (1962).

162. *Id.* (emphasis added).

163. See Richard H. Fallon, Jr., *Marbury* and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension, 91 Cal. L. Rev. 1, 14–20 (2003) (describing political and prudential considerations underpinning Justice Marshall's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

164. See Fallon, *Constitutional Precedent*, *supra* note 56, at 1138 (“Supreme Court decisions can be efficacious only insofar as they are accepted as legally legitimate by other public officials without whose cooperation judicial decrees would go unenforced.”); Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 Harv. J.L. & Pub. Pol’y 45, 51–53 (1994) [hereinafter Schauer, *Necessary Externality*] (arguing “ultimate validity” of Constitution is “political and sociological” question, and that “[i]t is only the raw empirical fact of political acceptance that makes ‘the Constitution of the United States’ and not ‘Schauer’s Constitution of the United States’ the Constitution of the United States”).

and Justices in taking into account the political acceptability of otherwise plausible interpretations of constitutional materials can bear on what judges and Justices legally *ought* to do, or at least legally permissibly can do.¹⁶⁵ If judges draw from past practice, and follow, a norm that calls for resolving otherwise doubtful questions in such a way as to avoid constitutional decisions that might well fail to command enduring adherence, then the norm will acquire a lawful status rooted in acceptance.

When and if the time comes for the Justices to decide the substantive question that *Padilla* presented, *Ex parte Quirin* will provide support for the propositions that the government can use military commissions to adjudge even citizens seized within the United States to be enemy combatants and that, having done so, the government can deal with such combatants as otherwise authorized by the laws of war. But the facts of *Quirin*, in which the citizen-petitioner did not contest his enemy combatant status, are easily distinguishable from any case in which a detainee denies being a military combatant, terrorist, or terrorist supporter and claims an entitlement to the safeguards of the civilian justice system. If *Quirin* were thus distinguished, *Ex parte Milligan*, with its ringing proclamation that trial by jury is every citizen's birthright, would point to the conclusion that the government cannot detain citizens at home as suspected terrorists without charging them with crimes in civilian courts.

With colorable arguments supporting opposite conclusions, any resolution of the legal issue will depend substantially on judgments about the "best" way to reconcile or align *Milligan*, *Quirin*, and now *Hamdi*. The Justices deciding this question will necessarily make normative and even quasi-political judgments with respect to which reasonable people could differ, especially if the occasion for decision comes when the threat of terrorist atrocities seems urgent.¹⁶⁶

165. The practice of judges, insofar as it is accepted or acquiesced by other officials and the broader public, fixes the "rule of recognition," H.L.A. Hart, *The Concept of Law* 116–17 (2d ed. 1994), by which conscientious Justices identify legal rights and obligations, including their own. See generally Richard H. Fallon, Jr., Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition and the Constitution, in *The Rule of Recognition and the U.S. Constitution* 47, 48 (Matthew D. Adler & Kenneth Einar Himma, eds.) (2009) [hereinafter Fallon, Precedent-Based Adjudication] (applying Hartian concept of rule of recognition to American constitutional practice). Although there is some circularity in defining judges' duties substantially by reference to what judges characteristically do and believe, such circularity becomes unavoidable once it is recognized that the foundations of law necessarily lie in the "raw empirical fact," Schauer, *Necessary Externality*, supra note 164, at 52, of a pertinent group's acceptance of standards of legal validity. Fallon, Precedent-Based Adjudication, supra, at 54.

166. As of this writing, however, the politically constructed space for judicial review of executive detentions seems substantially broader than it was in 1942. Among other things, the legal and political cultures are substantially more rights-oriented and civil libertarian than they were then. See, e.g., Jack L. Goldsmith & Cass Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const. Comment. 261, 271 (2002) (describing absence of opposition to *Quirin* tribunals).

2. *Noncitizens' Rights*. — Remarkably, as I noted above, as of 2009 the Supreme Court had not yet adjudicated even a single noncitizen's claim of substantive right to be free from indefinite executive detention as an enemy combatant or terrorist suspect. If preventive detentions of suspected terrorists continue into the future, however, several questions involving the substantive rights of detainees may require resolution. One may involve when the Government has legal authorization to detain noncitizens apprehended outside the United States—for example, in Afghanistan—on suspicion that they are enemy combatants or terrorists. The Bush Administration claimed inherent executive authority under Article II to detain enemy combatants until the cessation of hostilities. In addition, the Bush Administration advanced a definition of enemy combatant so expansive as to encompass—as a government lawyer once conceded—a “little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities.”¹⁶⁷ In the future, the Supreme Court might imaginably need to rule on claims of legal authorization as broad as those asserted by the Bush Administration. For the time being, the Obama Administration has disavowed pretensions of inherent executive authority and has staked its entitlement to detain terrorist suspects without civilian trial on the Authorization for Use of Military Force (AUMF) that Congress enacted in the aftermath of 9/11,¹⁶⁸ which it reads as permitting the detention of those who “substantially support[] . . . Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners.”¹⁶⁹ This change of position by no means forestalls challenges to some detentions as lacking authorization under the AUMF or any other statute. Another question concerns how long the detention of particular prisoners can lawfully extend in a struggle against terrorist threats that, unlike more traditional wars, may endure for generations. Also remaining unanswered—on the assumption that jurisdiction exists—are questions involving the substantive rights, if any, possessed by noncitizens who are detained abroad.¹⁷⁰

167. Brief for the Boumediene Petitioners at 34, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (No. 06-1195) (internal quotation marks omitted) (quoting *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005)).

168. Pub. L. No. 107-40, 115 Stat. 224 (2001).

169. Memorandum Regarding the Government's Detention Authority, *supra* note 10, at 2.

170. Apart from constitutional issues, the Court has also yet to rule squarely on whether noncitizens detained as enemy combatants may assert claims under the Geneva Conventions on federal habeas corpus. See, e.g., Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 Am. J. Int'l L. 322, 337–44 (2007) (discussing various approaches for upholding Military Commissions Act from challenge under Vienna Conventions); Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J. Int'l Crim. Just. 10, 18 (2007) (arguing Military Commissions Act supersedes Geneva Conventions in domestic law “as a later-in-time statute”); Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts:*

Seizures of noncitizens as enemy combatants within the United States may present different issues, especially if the noncitizens are lawfully resident here. The Supreme Court granted certiorari to resolve some of these issues in *al-Marri v. Pucciarelli*,¹⁷¹ but the newly installed Obama Administration quickly mooted the case by bringing a criminal prosecution against al-Marri in an Article III court.¹⁷²

3. *Some Conclusions and Comparisons.* — *First*, a juxtaposition of the Court's assertiveness in upholding judicial jurisdiction with its reticence regarding substantive rights reveals a noteworthy disparity. As of 2008, when the Court decided *Boumediene*, a majority of the Justices believed that the Constitution should be read to mandate habeas jurisdiction—and thus the potential for judicial oversight—in cases arising from executive detentions in the United States and at Guantanamo Bay, and possibly anywhere in the world. By contrast, a majority of the Justices has displayed reluctance to push very far in recognizing substantive rights to freedom from executive detention. The citizen-petitioners lost in *Hamdi* and *Munaf*.¹⁷³ Neither has the Court held that any noncitizen terrorist suspect has a substantive entitlement not to be subjected to executive detention.

Second, the Court's hesitancy to render substantive rulings—or at least substantive rulings in favor of detainees—may grow partly from a worry about the politically constructed bounds of judicial power. The Executive may be, and may be perceived as, better positioned than the judiciary to strike an informed balance between claims of liberty and the demands of national security.¹⁷⁴ Courts may therefore hesitate to upset the balance that the Executive has struck, especially if the perceived emergency is great and the Executive appears trustworthy.¹⁷⁵ Neverthe-

A Critical Guide, 101 Am. J. Int'l L. 73, 92–97 (2007) (discussing provisions of Military Commissions Act that directly address Act's interplay with Geneva Conventions).

171. 534 F.3d 213 (2008), cert. granted, 129 S. Ct. 680 (2008), vacated as moot sub nom. *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

172. See *al-Marri*, 129 S. Ct. at 1545 (dismissing al-Marri's appeal as moot).

173. See *Munaf v. Geren*, 128 S. Ct. 2207, 2220 (2008) (dismissing petitioners' claim that they have right not to be transferred to Iraqi custody); *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion) ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant.").

174. See Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* 27 (2006) (arguing for deference to Executive because "when in doubt about the actual or likely consequences of a measure, the pragmatic, empiricist judge will be inclined to give the other branches of government their head"); Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 15–18 (2007) (outlining "deferential view" of executive power in emergencies, under which judges defer to Executive in part because of Executive's informational advantage).

175. The Supreme Court's penchant for issuing jurisdictional and procedural rather than substantive rulings is partly a function of the kinds of claims that lawyers representing the War on Terror detainees have raised. See Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 Colum. L. Rev. 1013, 1062 (2008) ("[L]awyers at big firms know a lot about process and are eager to file pro bono briefs on the topic; they are less knowledgeable and therefore less eager to file briefs about whether particular

less, a judicial role that would be politically intolerable during an evident emergency might raise far fewer hackles once the crisis appears to abate. Looking ahead, one could thus anticipate that future events, as much as future appointments to the Supreme Court, may prove decisive in shaping the Court's response to claims of substantive rights to freedom from executive detention.

Third, even though the Court's jurisdictional rulings have not entailed the recognition of substantive rights, they have had the effect—which was almost surely intended—of unsettling the status quo ante by giving notice to the Executive Branch that its detention policies are not immune from judicial scrutiny. More specifically, the Court's jurisdictional decisions have invited litigation in the lower courts in which petitioners have asserted an array of substantive and procedural rights. The result has been a kind of “percolating” process¹⁷⁶ through which challenges to executive practices that are initially advanced in the lower federal courts draw public attention and, what is more, lay the foundation for future appeals to the Supreme Court. Despite relative quiescence to date, the Court has thus guaranteed itself future opportunities to consider what rights executive detainees have in a climate different from that which existed in the months and years immediately after 9/11.¹⁷⁷

C. *Procedural Rights, Including Rights to Judicial Review*

In the War on Terror cases decided so far, the Supreme Court has repeatedly upheld petitioners' claims of rights to fair procedures, including judicial review of executive branch decisions to classify detainees as enemy combatants. Perhaps because the Court's procedural rulings have not dictated the immediate release of any prisoners, the majority Justices may have perceived such rulings as more safely within the politically constructed bounds of judicial authority than holdings enforcing substantive rights. Nonetheless, the Court's rulings have not lacked significance in either the legal or the political domains.

interrogation practices constitute torture, or whether data mining violates the Fourth Amendment.”). But the lawyers' framing of their cases, in turn, surely reflects their anticipation of the likely judicial receptivity to jurisdictional and procedural claims, on the one hand, and substantive claims on the other. My speculation would be that substantive rulings are understood by both lawyers and judges as being likely to have greater political salience than jurisdictional and procedural rulings, and as therefore more likely to lie outside the politically constructed bounds of acceptable judicial decisionmaking.

176. This percolating process, through which the Supreme Court unsettles a body of lower court precedent that is in danger of ossification for one reason or another, is perhaps best captured by the Supreme Court's role in reviewing patent issues in the Federal Circuit. See generally John M. Golden, *The Supreme Court as “Prime Percolator”: A Prescription for Appellate Review of Questions in Patent Law*, 56 *UCLA L. Rev.* 657 (2009) (discussing percolating function of Supreme Court's interventions in patent law).

177. The first such opportunity will come in the pending case of *Kiyemba v. Obama*, discussed *supra* notes 3 and 73.

1. *The Court's Rulings.* — In *Hamdi v. Rumsfeld*,¹⁷⁸ the plurality opinion—the pertinent sections of which Justices Souter and Ginsburg also accepted¹⁷⁹—employed the balancing test of *Mathews v. Eldridge*¹⁸⁰ to identify the minimal procedural safeguards that the government must afford a citizen-petitioner who was apprehended on a foreign battlefield before classifying him as an enemy combatant subject to indefinite detention. In its balancing analysis, the *Hamdi* plurality credited the government's interest not only in detaining enemy combatants, but also in avoiding trial-like processes that would distract military officers engaged in distant battles and “intrude on the sensitive secrets of national defense.”¹⁸¹ At the same time, the controlling opinion rejected as insufficient the rudimentary process that the government had previously provided. Due process, the Court ruled, requires that “a citizen-detainee . . . receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.”¹⁸² The Justices further held, however, that hearsay evidence could be admitted and that in some circumstances the detainee could have the burden of refuting the government's evidence.¹⁸³

In *Hamdan v. Rumsfeld*, the Court determined that the military commissions designed by the Defense Department to try Guantanamo detainees for war crimes failed to satisfy the requirements that Congress had established in the Uniform Code of Military Justice, which, the Court held, incorporated parts of the Geneva Conventions.¹⁸⁴ The *Hamdan* opinion rested squarely on the interpretation of federal statutes; it did not resolve any constitutional issues.¹⁸⁵ Indeed, in concurring opinions, Justices Breyer and Kennedy both emphasized that Congress had the power to determine how military commissions should be structured.¹⁸⁶

But their suggestion that *Hamdan* left Congress with broad discretion proved ephemeral. When Congress subsequently enacted the Military Commissions Act, which purported to strip the federal courts of habeas

178. 542 U.S. 507.

179. See *id.* at 553 (Souter, J., concurring) (“[T]he need to give practical effect to the conclusions of eight Members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose.”).

180. 424 U.S. 319 (1976).

181. 542 U.S. at 532 (plurality opinion).

182. *Id.* at 533.

183. *Id.* at 533–34.

184. 548 U.S. 557, 625, 627–28 (2006).

185. See *id.* at 612–13 (disposing of case based upon finding that Article 21 of UCMJ does not authorize use of military commission to try detainees for crimes unrelated to violations of laws of war).

186. See *id.* at 653 (Kennedy, J., concurring in part) (“Because Congress has prescribed these limits, Congress can change them”); *id.* at 636 (Breyer, J., concurring) (“Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger.”).

corpus jurisdiction over Guantanamo detainees and substituted a more limited scheme of D.C. Circuit review of military commissions' decisions,¹⁸⁷ the same five Justices who had formed the *Hamdan* majority held in *Boumediene* that the Act's jurisdiction-stripping provision violated the Suspension Clause.¹⁸⁸ *Boumediene* thus restored federal habeas as a vehicle for judicial review of the government's revamped military commission scheme. In conducting that review, *Boumediene* held, a habeas court should not limit itself to determining whether a military commission had jurisdiction to try a prisoner, or even whether it had employed fair procedural rules, but must conduct more searching case-by-case review of determinations of fact as well as law.¹⁸⁹

Against the background of *Hamdi*'s suggestion that properly constituted military tribunals might provide suspected enemy combatants with all the process they are due, *Boumediene*'s insistence that Guantanamo detainees have a right to habeas review of issues of both law and fact marks a significant change.¹⁹⁰ One could only speculate that, between *Hamdi* and *Boumediene*, Justices Kennedy and Breyer—the only two Justices to vote with the majority in both cases—had lost faith in the capacity of the Executive Branch to structure a fair process for determining enemy combatant status in the absence of judicial oversight.

Significantly, however, Justice Kennedy's Court opinion in *Boumediene* said nothing about the requirements of procedural due process in military commission proceedings. Instead, it relegated responsibility for initial determination of disputed issues to the district courts, subject to rights of appeal and subsequent Supreme Court review.¹⁹¹ Writing in dissent, Chief Justice Roberts protested, plausibly, that by charging the district courts with developing a complex body of procedural law, the majority's decision had done little or nothing to expedite the

187. See Military Commissions Act of 2006, Pub. L. No. 109-366, Sec. 3, § 950g, Sec. 7, 120 Stat. 2600, 2622, 2635–36 (codified at 10 U.S.C. § 950g and 28 U.S.C. § 2241(e)(1)).

188. *Boumediene v. Bush*, 128 S. Ct. 2229, 2274 (2008).

189. *Id.* at 2270–71.

190. Writing for the Court in *Boumediene*, Justice Kennedy correctly noted that *Hamdi* had presented no question about the necessary availability of habeas review, but he did not seriously dispute the *Hamdi* plurality's implication that decisionmaking by a military tribunal would suffice as long as the tribunal complied with the due process requirements that the plurality set forth. See *id.* at 2269 (“None of the parties in *Hamdi* argued there had been a suspension of the writ. . . . Accordingly, the plurality concentrated on whether the Executive had the authority to detain and, if so, what rights the detainee had under the Due Process Clause.”). Kennedy also pointed out that the *Hamdi* plurality opinion, which he joined, did not speak for a majority. *Id.* (“[T]he relevant language in *Hamdi* did not garner a majority of the Court”). But Justice Thomas's dissenting opinion made a fifth vote that procedures in excess of those required by the plurality were constitutionally unnecessary.

191. See *id.* at 2270–71, 2275–77 (declining to resolve various disputed procedural questions); *id.* at 2276 (“These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.”).

petitioners' receipt of fair, conclusive hearings on the merits of their claims not to be enemy combatants subject to executive detention.¹⁹²

2. *Observations.* — Notwithstanding the myriad significant issues that *Boumediene* left for later resolution, the Court's War on Terror habeas decisions manifest a far greater willingness to rule for petitioners on grounds of procedure than of substance—a point that Jenny Martinez has made in a lengthy and thoughtful critique of the Court's performance.¹⁹³ In her view, the Court has done too little.¹⁹⁴ By the time she wrote, too many detainees had languished at Guantanamo and elsewhere for too long.

Without pretending to answer Professor Martinez's criticisms, I would offer three observations, echoing themes that I have sounded already. *First*, on a deeply divided Court, some of the Justices appear to have believed that the domain within which they can most confidently displace executive with judicial judgment is that of procedural fairness. This is a sphere of special judicial expertise. It is also a sphere within which the courts are likely to do less serious harm than they might risk if they took bold stands recognizing substantive rights to freedom from detention.¹⁹⁵ For as long as the Court wishes to maintain a broadly reaching habeas jurisdiction, but hesitates to define substantive rights expansively, it almost necessarily acts most assertively in the realm of procedure.

Second, the Court's decisions seem to have been intended to provoke reconsideration, especially by Congress, of executive branch policies in the War on Terror. For better or for worse, this approach accords with the role that the courts have frequently played in the past when confronted with claims of civil liberties violations during war and emergency.¹⁹⁶

192. See *id.* at 2279–80 (Roberts, C.J., dissenting) (“The majority merely replaces a review system designed by the people’s representatives with a set of shapeless procedures to be defined by federal courts at some future date.”); *id.* at 2293 (“So who has won? Not the detainees. The Court’s analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases . . .”).

193. See generally Martinez, *supra* note 175.

194. See *id.* at 1092 (“Unfortunately, the ‘war on terror’ litigation thus far seems to have resulted in a great deal of process, and not much justice.”).

195. See Neal Katyal, *Equality in the War on Terror*, 59 *Stan. L. Rev.* 1365, 1381 (2007) (asserting that although “[i]t is a truism in war powers analysis that the courts fear rigid rules that might deprive the President of tools he needs to wage war effectively . . . [p]rocedural challenges . . . are more plausible candidates for success”); Sunstein, *supra* note 86, at 108–09 (maintaining that “judges lack the information that would permit them to make sensible judgments about when an intrusion on liberty is justified, and the costs of judicial errors in the direction of liberty may . . . be catastrophic,” but calling for courts nevertheless to enforce procedural rights).

196. See Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 *N.Y.U. L. Rev.* 1, 74 (2005) (suggesting Court, in wartime, tends to engage “in a process-oriented mode of decisionmaking . . . ensuring authorization from the democratic branches of government” in order to “ensure[] the political legitimacy of a ruling”); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and*

Third, judicial judgments of what is constitutionally best are by no means necessarily static, nor is the politically defined space within which judicial review can operate authoritatively. Judicial decisions can affect and sometimes help to expand the sphere of politically tolerable judicial decisionmaking. Habeas jurisdiction over War on Terror detainees at Guantanamo Bay has ceased to be a novelty; judicial rulings in detainees' cases continue to arouse interest and dispute, but the exercise of jurisdiction itself is now largely taken for granted. In the future, if procedural decisions appear ineffectual in correcting perceived injustices, then substantive interventions that might have been unthinkable when the Court first asserted itself in the domains of jurisdiction and procedure may come to appear politically acceptable—at least for as long as the nation seems relatively safe. As much in habeas corpus law as in other dimensions of law and life, past developments often function as the prologue to larger, if gradual, future innovations. To put the point slightly differently, although judicial review operates within politically constructed bounds, the Justices of the Supreme Court have some capacity to affect the political processes through which the bounds of their power are constructed.

CONCLUSION

In this Essay, I have sought to integrate legal doctrinal analysis of the Supreme Court's habeas cases arising from the War on Terror with three insights derived from modern political science. Each of those insights generates important conclusions about the Court's work product to date.

First, as political scientists who emphasize that the domain of judicial authority is politically constructed would have predicted, the Court has operated mostly on the margins of what the Bush Administration called the War on Terror. Most notably, the Court has given no hint that those subject to attack and death in foreign military operations have any judicially enforceable rights to life, liberty, or property. Foreign espionage activities remain off limits to judicial inquiry. Only in the cases of prisoners captured in or brought to the United States or Guantanamo has the Court, so far, approved the lower courts' assumption of oversight authority.

Nevertheless, even as the Supreme Court has stayed far from the center of the nation's War on Terror policy, it has, through its jurisdictional and procedural rulings, cautiously extended the margins along which judicial power can operate. Partly as a result, more substantive rul-

Executive Unilateralism: An Institutional Process Approach to Rights During Wartime, 5 Theoretical Inquiries L. 1, 35 (2004) (asserting U.S. courts have adopted "democratic-process based view that emphasizes that the judicial role in reviewing assertions of power during exigent circumstances should focus on ensuring whether there has been bilateral institutional endorsement for the exercise of such powers," rather than adopting "a view that the judicial role should be to determine on its own the substantive content and application of 'rights' during wartime").

ings, and possibly more recognitions of substantive rights, may now lie in prospect. Among other things, the political climate, along with a lessening sense of the urgency of the terrorist threat, may alter the Justices' perceptions of the wisdom and political acceptability of affirmations of rights.

Second, again in the vocabulary of political scientists, George W. Bush was a failed reconstructive President. The Supreme Court has refused to accept that the Constitution gives the executive an almost totally unreviewable authority to detain whomever it sees fit in the name of national security. The electorate has not rallied in outrage at the Court's decisions. In the first few years following 9/11, it was far from obvious that either the Court or the public would respond to the Bush Administration as it did. The framework of constitutional assumptions within which the Court functions is vulnerable to shock and destabilization. Lawyers who want to understand constitutional law must attend to the role of actors besides the Supreme Court in shaping the domain of politically tolerable assertions of judicial power.

Third, it is important to recall that the Supreme Court is a "they," not an "it," and to disaggregate "the Court" into individual Justices. The Justices have divided closely over most of the issues that the War on Terror has brought before them. Justice Kennedy has cast the decisive vote in a disproportionate share of cases. As I have noted, his style of decision-making appears to blend moralism with pragmatism in an idiosyncratic mixture. As others have pointed out, Justice Kennedy also seems sensitive to the public's shifting moral sensibilities.¹⁹⁷ To a remarkable degree, the law that has emerged to date reflects Justice Kennedy's distinctive stamp.

I am loath, however, to end this Essay by focusing on a single sitting Justice, for one of my principal themes has been that what the Justices have said and done in the past will not necessarily determine the future of habeas corpus doctrine. Through constitutional history, much that was once unsettled about the federal courts' habeas jurisdiction appears to have become settled, some of it in the Supreme Court's War on Terror cases. In this corner of the law, however, the likelihood of final judicial settlement seems dramatically limited, for two related reasons. First, any genuine judicial settlement must occur within politically constructed bounds, and in matters involving executive powers of detention under conditions of war and emergency, the bounds of political acceptability are peculiarly volatile. Second, the higher the perceived stakes of any particular dispute, the less likely it seems that the Justices (or other political actors) will accept a conclusion as having been determined in advance

197. See, e.g., Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. Cin. L. Rev. 1257, 1302 (2004) ("[T]he median Justices [O'Connor and Kennedy] on the present Court seem consciously attuned to public opinion."); Merrill, *supra* note 137, at 629 ("Court watchers have long suggested that [Justices O'Connor and Kennedy] are the most sensitive to external forces.").

unless it appears to them to be substantively wise or desirable.¹⁹⁸ As history demonstrates, the stakes of habeas cases arising from executive detention in wars and emergencies often seem exceedingly high.

Because issues arising from the extension of habeas jurisdiction to national security cases are so distinctively charged, I shall not, here, attempt to establish or even speculate how my analysis of the Supreme Court's performance thus far in War on Terror cases—and, in particular, my claims about the Court's sensitivity to the politically constructed bounds of judicial power—might be generalized to other kinds of cases presenting other kinds of issues. As I have argued elsewhere, the Justices are surely aware of, and to some extent respond to, a variety of practical as well as distinctively legal constraints on their power,¹⁹⁹ but the practical constraints may be maximally palpable in the domain of military policy and national security, especially during times of perceived emergency.

To understand the doctrine that the Supreme Court has crafted in the War on Terror therefore requires seeing it in context. A number of legal rules have emerged, some of them surprising and some controversial. For now, the lower courts will presumably apply those rules faithfully. Yet the limits of purely doctrinal analysis seem plain. Should the War on Terror become significantly more terrifying, all bets would be off.

This may seem a depressing conclusion for legal doctrinalists,²⁰⁰ but I do not so intend it. It is at least inevitable, and probably desirable, that the ideal of the rule of law should have some (which is not to say limitless) play in the joints²⁰¹—even with respect to the Great Writ that our tradition celebrates as liberty's ultimate safeguard.

198. See Adrian Vermeule, *Holmes on Emergencies*, 61 *Stan. L. Rev.* 163, 197 (2008) (“Emergencies are novel situations, so the informational value of precedent is reduced.”).

199. See Fallon, *Constitutional Constraints*, *supra* note 38, at 1015–24 (discussing influence of “external constraints” on judicial decisions).

200. See Pushaw, *supra* note 46, at 2047, 2050 (asserting “*Boumediene* . . . simply imposed the will of five Justices who disagreed personally and politically with the government’s detainee policies,” in contravention of rule of law ideal, and predicting that Court will retreat to deferential posture “when the next military crisis” arrives).

201. Cf. Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 *Cal. L. Rev.* 301, 309 (2009) (“[G]eneral rules and situation-specific improvisation, far from being mutually exclusive, are perfectly compatible.”).

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